86-1034

NO. _____

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is the 1985 Amendment to § 18.2-391 of the Code of Virginia making it illegal to knowingly display certain pornographic material where children can examine and peruse it unconstitutional on its face?

PARTIES BELOW

The appellants in the court of appeals were the Commonwealth of Virginia by her Attorney General and William K. Stover, Chief of Police for Arlington County, Virginia. The appellees were the American Booksellers Association, Inc., the Association of American Publishers, the Council for Periodical Distributors Association, Inc., the National Association of College Stores, Inc., Books Unlimited, Inc., of Arlington, Virginia, and Ampersand Books of Alexandria, Virginia.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The judgment and opinion of the United States District Court for the Eastern District of Virginia is reported at 617 F. Supp. 699 and is reproduced in the appellant's Appendix. (App. D at A-15). The initial opinion and judgment of the United States Court of Appeals for the Fourth Circuit dated June 12, 1986, is reported at 792 F.2d 1261, but the court of appeals' corrected modified opinion dated September 30, 1986, has not yet been reported; the court of appeals' opinion, including its modification and correction, is reproduced in the appellant's Appendix. (App. A at A-1).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit held the 1985 amendment to § 18.2-391 of the Code of Virginia repugnant to the United States Constitution in a corrected modified opinion dated September 30, 1986. The court of appeals' jurisdiction was assertedly based on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202 and the First, Fifth and Fourteenth Amendments.

The appellate jurisdiction of this Court is therefore invoked under 28 U.S.C. § 1254(2), which provides for the direct appeal to this Court from a decision of a federal court holding a state statute to be unconstitutional. To the extent that any question presented herein is found to fall outside this Court's jurisdiction under 28 U.S.C. § 1254(2), the Court's discretion under 28 U.S.C. § 2103 to grant review by writ of certiorari is invoked. *See Maine v. Taylor*, 477 U.S.___, 106 S.Ct. 2440, 91 L.Ed.2d 110, 119 n.4 (1986).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution states in pertinent part that, "Congress shall make no law . . . abridging the freedom of speech. . . ." The Fifth and Fourteenth Amendments to the United States Constitution state in pertinent part that, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The relevant federal statutes are 28 U.S.C. §§ 2201 and 2202, commonly called the declaratory judgment statutes, and 42 U.S.C. § 1983. These statutes are reproduced in the appellant's Appendix. (App. J at A-41).

The relevant Virginia statutes are §§ 18.2-390 and 391 of the Code of Virginia. These statutes, with the pertinent 1985 amendment to § 18.2-391 italicized, are reproduced in the appellant's Appendix. (App. K at A-42, 44).

STATEMENT OF THE CASE

Section 18.2-391 of the Code of Virginia has prohibited the sale or loan of certain sexually explicit matter to juveniles for some fifteen years; section 18.2-390 defines the terms used in the article. On July 1, 1985, an amendment enacted by the General Assembly of Virginia, hereinafter "the Amendment," became part of Code § 18.2-391. The Amendment made it unlawful to knowingly display for commercial purposes these long proscribed materials where children can examine and peruse them. (App. K at A-44).

A complaint was filed in the United States District Court for the Eastern District of Virginia, Alexandria Division, on July 16, 1985, by an array of trade associations, bookstores and individuals. Named as defendants were Charles T. Strobel, Director of Public Safety for the City of Alexandria, and William K. Stover, Chief of Police for Arlington County, although neither official had taken any action to enforce the Amendment. The suit was based on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202 and the First, Fifth and Fourteenth Amendments to the United States Constitution. The plaintiffs asked for a declaratory judgment that the Amendment was unconstitutional and sought injunctive relief.

Finding that the complaint called into question the constitutionality of a State statute which affected the public interest, the district court ordered that the Attorney General of Virginia be given the opportunity to intervene in the action on behalf of the Commonwealth of Virginia pursuant to 28 U.S.C. § 2403(b). (App. F at A-34). On July 26, 1985, the Attorney General of Virginia accepted the district court's invitation and intervened in the case. (App. G at A-36).

The district court rendered its judgment and opinion on September 10, 1985, finding that the bookstores and trade associations had standing to sue, that an actual case or controversy existed, and that the Amendment was unconstitutionally overbroad on its face. The court dismissed the complaint as to the individuals who had sued, finding that they did not have standing. The district judge permanently enjoined defendants Strobel and Stover from enforcing the Amendment. (App. D at A-15).

Virginia and defendant Stover filed notices of appeal. Defendant Strobel did not appeal the district court's judgment.

The prevailing plaintiffs thereafter applied for an award of costs and attorney fees under 42 U.S.C. § 1988 in the amount of $17,035.77. The district court concluded that it was equitable to let the costs lie where they fell and denied the plaintiffs' request for fees. (App. E at A-31). The plaintiffs appealed the district court's fee decision to the United States Court of Appeals for the Fourth Circuit.

After briefing and oral argument, a panel of the court of appeals rendered its opinion on June 12, 1986, affirming the district court's judgment that the Amendment was facially overbroad. The district court's refusal to grant attorney fees under § 1988 was, however, reversed. *American Booksellers Ass'n v. Com. of Va.*, 792 F.2d 1261 (4th Cir. 1986). (App. A at A-1).

Defendant Stover, who had argued on appeal that the plaintiffs did not have standing to sue, petitioned for rehearing with a suggestion for rehearing *en banc*. On September 26, 1986, the court of appeals refused Stover's rehearing petition by a vote of six to four with one judge having disqualified himself. (App. B at A-13). Four days later, however, the court issued a modified opinion, which was subsequently corrected, affirming the district court's

fee decision as to the local defendants, but ordering the assessment of fees against the State. (App. A at A-12).[1]

Virginia filed her notice of appeal with the clerk of the court of appeals on October 9, 1986. (App. I at A-39). Upon Virginia's motion, the court of appeals stayed its mandate pending the timely filing of an appeal with this Court. (App. C at A-14).

STATEMENT OF REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

Almost two decades ago this Court found that the First Amendment does not preclude a State from regulating the sale of pornographic material to children which, although not obscene for adults, is "harmful to juveniles." *Ginsberg v. New York*, 390 U.S. 629 (1968). The question presented here is whether the Commonwealth of Virginia can constitutionally prohibit merchants from displaying this *very same* proscribed material where children can examine and peruse it at their leisure. Virginia's interest in regulating such activity is just as compelling as the legitimate state interest in *Ginsberg;* the federal question presented is equally as substantial.

It is now axiomatic that obscene material does not fall within the parameters of constitutionally protected speech. *See Miller v. California*, 413 U.S. 15 (1973). And the doctrine of "variable obscenity" enunciated in *Ginsberg* allows the definition of obscenity to be constitutionally adjusted "to social reality by permitting the appeal of . . . [sexually explicit] material to be assessed in terms of the sexual interest . . . 'of . . . minors.' " *Ginsberg*, 390 U.S. at 638, *quoting Mishkin v. New York*, 383 U.S. 502 (1966); *see also New York v. Ferber*, 458 U.S. 747 (1982).

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[1] The court of appeals' original opinion and its corrected modified opinion are the same except for the last page. The opinion reproduced in the appellant's Appendix is the court's corrected modified opinion containing all changes.

In response to *Ginsberg*, the General Assembly of Virginia enacted §§ 18.2-390 and 391 of the Code of Virginia making it unlawful to knowingly sell or loan to children sexually explicit items that are harmful to them; these statutes were nearly identical to the one validated in *Ginsberg*. The definition of "harmful to juveniles" found in § 18.2-390(6) was subsequently modified to comport with the *Miller v. California* standard. Then, in 1985, § 18.2-391 was amended to also make it unlawful to knowingly display for commercial purposes these same proscribed materials where juveniles could examine and peruse them (App. K at A-44), making Virginia one of at least twenty-eight states and several localities having a law concerning the display or exhibition of pornographic material to juveniles. (App. L at A-46).

Although the Amendment is somewhat different from the *Ginsberg* statute in that it involves the display of pornographic material, not just its sale, this Court has never limited the variable obscenity doctrine to just "sales." Indeed, although Sam Ginsberg had only been prosecuted for the actual sale of restricted material to minors, this Court described the New York statute as one which denied minors "access" to objectionable material, as a regulation of "the availability of sexual material to minors," and as a restraint on minors' "'exposure to such material.'" 390 U.S. at 636, 639; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (society has the right to adopt more stringent controls on communicative materials *available* to youths than on those available to adults); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (adult access to non-obscene, but sexually explicit, material can be limited under some circumstances in order to protect children from its effects).

Despite this Court's recognition that the State's interest in protecting its children from harmful sexually explicit matter is both substantial and constitutional, the Fourth Circuit invalidated the Amendment as being

unconstitutionally overbroad on its face. In reaching this result, the court of appeals ignored both the decisions of this Court and of the United States Courts of Appeals for the Eighth and Tenth Circuits.

"A 'facial' challenge . . . means a claim that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Village of Hoffman Estates v. Flipside, Inc.*, 455 U.S. 489, 499 n.5 (1982); *see Brockett v. Spokane Arcades, Inc.*, 472 U.S. ___, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). Consequently, this Court has consistently admonished that the application of the facial overbreadth doctrine is "manifestly strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Broaderick v. Oklahoma*, 413 U.S. 601, 613-614 (1973). This Court has " 'never found that a statute could be facially invalid merely because it is possible to conceive of a single impermissible application. . . .' " *Ferber*, 458 U.S. at 772.

A facial overbreadth analysis is applied less rigidly to statutes governing materials entitled to less than full First Amendment protection. In *Broaderick*, for example, it was noted that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment." 413 U.S. at 614-15. A statute should never be stricken for alleged facial overbreadth where a case-by-case analysis can obviate difficulties in construction:

> 'Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise.' *Flipside*, 455 U.S. at 504.

Even when a facial overbreadth analysis is unavoidable, which certainly was not the case here, where conduct plus

speech is involved the overbreadth must be both "real" and "substantial" in relation to the statute's "plainly legitimate sweep." *Ferber*, 458 U.S. at 770, *quoting Broaderick*, 413 U.S. at 615; *Erznoznik*, 422 U.S. at 216.[2]

Despite this Court's strong admonitions against facial overbreadth invalidation, the court of appeals concluded that the Amendment was overbroad on its face because its "language is broad, and it does not provide any potential defenses or methods of compliance." (App. A at A-8). But the Amendment does not prohibit the examination, perusal or dissemination of proscribed materials by or to adults, any more than the rest of § 18.2-391 or the *Ginsberg* statute deny adults access to, and retailers the right to sell, materials "harmful to juveniles."

Such display provisions as the Amendment do "'not prohibit adults from purchasing non-obscene materials; adults continue to have ultimate access to the materials in question.'" *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1985). "[T]he proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. * * * [A]dults may still have some access to materials not obscene as to them, and they may

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[2] Although the court of appeals below found that the Amendment involved pure speech, the Tenth Circuit has found otherwise in validating an ordinance similar to, but more restrictive than, the Amendment. *M. S. News Co. v. Casado*, 721 F.2d 1281, 1289 (10th Cir. 1983) ("The portion of the Wichita ordinance proscribing display to minors is conduct plus speech because it regulates the manner in which material with a particular content can be disseminated; it does not regulate pure speech itself.")

The Eighth Circuit has concluded that, even if a display provision is not content-neutral, it is still permissible as "a reasonable means of attempting to control the merchandizing to minors of sexually explicit material obscene as to them." *Upper Midwest Booksellers Assoc. v. City of Minneapolis*, 780 F.2d 1389, 1396 (8th Cir. 1985), *citing New York v. Ferber*, *FCC v. Pacifica Foundation*, and *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

purchase such material." *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288-89 (10th Cir. 1983); *see also Ginsberg*, 390 U.S. at 634-35 (retailers not prohibited from stocking and selling magazines covered under the statute); *Pacifica Foundation*, 438 U.S. at 750 n.28 (adults still may purchase material despite restrictions).

As for the Fourth Circuit's concern that the Amendment does not list any potential defenses or methods of compliance, since the Amendment does not suffer from vagueness, a facial overbreadth analysis does not require that the statute itself list ways of compliance: so long as a limiting construction *could* be placed on the challenged provision, it is not facially overbroad. *See Broaderick*, 413 U.S. at 613. As long as it is clear what a display statute makes illegal, it need not spell out what a retailer must do to comply with it; this is left, for example, to the business policies he wants to adopt. *See Capital News Co., Inc. v. Metro. Gov't., etc.*, 562 S.W.2d 430, 433 (Tenn. 1978).

Moreover, the Amendment has a scienter requirement. This allows retailers to "avoid the hazard of self-censorship of constitutionally protected material," *see Ginsberg*, 390 U.S. at 644, and relieves them of the obligation to have an actual awareness of the contents of every book or magazine they sell or display. *See American Booksellers Ass'n, Inc. v. Rendell*, 481 A.2d 919, 941 (Pa. Super. 1984); *Freeman v. Commonwealth*, 233 Va. 301, 311, 288 S.E.2d 461 (1982). The scienter requirement likewise allows the retailer to comply with the Amendment's display provision by making a good faith effort, by any means, to restrict juveniles from examining *and* perusing material that the bookseller actually knows or has reason to know is proscribed. Accordingly, Virginia suggested numerous ways to the court of appeals that a retailer could comply with the Amendment: the material could be placed in so-called "blinder racks," in wrappers preventing perusal or in "adult only" racks, display methods found by the Eighth and Tenth Circuits to be minimally intrusive. *See Upper Midwest Booksellers; M.S. News.* Even easier, perhaps,

tags could be placed on the materials in question, or they could be color coded. And, of course, the merchant would continue to have the protection of the applied overbreadth doctrine in questionable circumstances. *See Broaderick*, 413 U.S. at 615-16.

Simply put, then, the fact that a merchant might have to take some additional steps to segregate sexually explicit material does not mean that the Amendment is facially overbroad. Indeed, as in *New York v. Ferber*, "it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity." 458 U.S. at 772.

All of this notwithstanding, the court of appeals below still found that the Amendment was facially overbroad under the *Erznoznik* test because a narrowing construction was not readily apparent. Yet, while the movie display ordinance in *Erznoznik* was invalidated because it was not sufficiently narrow, this Court suggested that Jacksonville's ordinance could have been saved if it had been restricted to movies obscene for minors; the City of Jacksonville and the Florida courts simply failed to suggest such a construction. 422 U.S. at 216, n.15.

The court of appeals below also found that the Amendment could not be saved as a valid time, place and manner regulation because it involves the content of the regulated speech. This conclusion is also in conflict with the Eighth and Tenth Circuits which have both held that such display provisions as the Amendment are valid time, place and manner regulations. *Upper Midwest Booksellers*, 780 F.2d at 1396-97; *M. S. News*, 721 F.2d at 1288, *citing Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

Although it is true that the Amendment involves the "content of the regulated speech," in the sense that to be subject to the Amendment's requirements the material's contents must be "harmful to juveniles," this is no different than the theatres in *American Mini Theatres* being subject to Detroit's ordinance because of the content of the movies they showed. The point is that the Amendment does not attempt to regulate the contents of the speech: it simply requires that the speech be displayed in a manner so as to avoid harming children.

In his *American Mini Theatres* concurrence, Justice Powell stated, "We have here merely a decision by the city to treat certain movie theatres differently because they have markedly different effects upon their surroundings. . . ." 427 U.S. at 82, n.6. The same is true of the Amendment: We have here merely a decision by the General Assembly of Virginia to treat the display of certain materials differently because they have recognized harmful effects upon children. In any event, as this Court recently observed, Justice Powell further stated in *American Mini Theatres:*

> "'[E]ven if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated.'"

Renton v. Playtime Theatres, ____ U.S. ____, 106 S.Ct. ___, 89 L.Ed.2d 29, 39 (1986).

CONCLUSION

The federal question presented here is clearly one of substantial importance: it involves the invalidation of a duly enacted state statute by a federal court, surely one of the most significant events possible under our system of federalism; the Fourth Circuit's judgment has created a clear conflict among the federal courts of appeals; at least twenty-eight (28) states and several localities have provisions concerning the display of pornographic materials to minors in one form or another (App. L at 46); and, lastly, "the regulation of sales without control over commercial displays of materials deemed harmful to minors would render" meaningless the protective efforts constitutionally validated by this Court in *Ginsberg*. *See Rendell,* 481 A.2d at 942. This substantial and important issue is worthy of this Court's full consideration.

Respectfully submitted,

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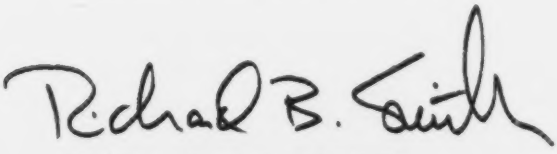
Attorney General of Virginia



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December 24, 1986

APPENDIX

PUBLISHED

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 85-1961 (L)

American Booksellers Association, Inc.; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.: Books Unlimited, Inc.; Ampersand Books;

Appellees,

versus

Commonwealth of Virginia,

Appellant.

and

Charles T. Strobel; William K. Stover,

Defendants.

No. 85-1999

American Booksellers Association, Inc.,; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.; Books Unlimited, Inc.; Ampersand Books;

Appellees,

versus

William K. Stover,

Appellant,

and

Charles T. Strobel,

Defendant.

CORRECTED MODIFIED OPINION
NEW PAGE 2

No. 85-2284

American Booksellers Association, Inc.
Association of American Publishers;
Council for Periodical Distributors
Association; International Periodical
Distributors Association, Inc.; National
Association of College Stores, Inc.;
Books Unlimited, Inc. and Ampersand Books,

and

Appellants,

Amy Bush and Jessica Bush,

versus

Plaintiffs,

Charles T. Strobel; William K. Stover
and the Commonwealth of Virginia,

Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C/A 85-816-A).

Argued: February 5, 1986 Decided: September 30, 1986

Before PHILLIPS and SPROUSE, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Ara L. Tramblian, Assistant County Attorney (Charles G. Flinn, Arlington County Attorney on brief) for Appellant/cross-appellee William K. Stover; Richard B. Smith, Assistant Attorney General (William G. Broaddus, Attorney General; Mary Sue Terry, Attorney General; John H. McLees, Jr., Assistant Attorney General on brief) for Appellant/cross-appellee Comonwealth of Virginia; Michael A. Bamberger (David C. Burger; Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey on brief) for Appellees/cross-appellants.

SPROUSE, Circuit Judge:

This appeal concerns the constitutionality of a 1985 amendment to a Virginia statute which attempts to shield juveniles from the commercial display of sexually explicit material. The defendants, the Commonwealth of Virginia and William K. Stover, Chief of Police for Arlington County, Virginia, appeal from the district court's order declaring unconstitutional the amendment to Virginia Code § 18.2-391(a) and permanently enjoining them from enforcing the amendment.[1] The plaintiffs, the American Booksellers Association, Inc., four other trade associations, and two retail bookstores (hereinafter collectively referred to as the Booksellers) appeal from the district court's denial of attorneys' fees. We affirm the district court's decision that the amendment is unconstitutional, but reverse its denial of plaintiffs' attorneys' fees.

The pre-amendment statute, for some years, has prohibited the sale to minors of sexually explicit materials defined as harmful to juveniles, including some materials which are not obscene as to adults. The constitutionality of that underlying statute is not in issue in this appeal. The Virginia General Assembly amended the statute, however, effective July 1, 1985, making it unlawful to knowingly display these materials "in a manner whereby juveniles may examine and peruse" them. Va. Code § 18.2-391(a) (Supp.

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[1] Charles T. Strobel, Director of Public Safety for the City of Alexandria, Virginia, was named as a defendant in the district court, but has not appealed from that court's judgment.

1985).[2] Approximately two weeks after the effective date of the amendment, and prior to any enforcement action by the defendants, the Booksellers brought this action asserting that the amendment is facially unconstitutional.[3] They sought declaratory and injunctive relief to prevent its enforcement as well as costs and attorneys' fees pursuant to 42 U.S.C. § 1988 (1982). After a hearing on the defendants' motion to dismiss, the district court declared the amendment unconstitutional and enjoined its enforcement.

The Commonwealth and Stover appeal the district court's finding that the Booksellers had standing to attack the amendment and the Commonwealth also appeals that court's ruling that the amendment is facially unconstitutional as violative of the first amendment.

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[2] The amended section 18.2-391(a) provides that:

> It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*
>
> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
>
> (2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(Emphasis supplied to show language added by the 1985 amendment.)

[3] The action was based on federal constitutional provisions, as well as 42 U.S.C. § 1983 (1982) and 28 U.S.C. §§ 2201 and 2202 (1982).

I.

To survive an initial attack challenging standing, a plaintiff must show that an actual controversy exists and must allege a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Commonwealth and Stover contend that the Booksellers have not demonstrated an actual case or controversy. They point out that there has been no proof that the Booksellers have been prosecuted, threatened with prosecution, or have detrimentally changed their behavior as a result of the amendment.

We agree with the district court that the Booksellers have standing to challenge the amendment. The Booksellers have shown a legitimate concern that the amendment will be implemented so as to infringe on their first amendment right of "free speech." This is more than a concern merely "held in common by all members of the public." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974). There is little doubt that compliance with the amendment threatens the Booksellers with economic injury; each of the methods of compliance suggested by the Commonwealth would interfere with the Booksellers' marketing methods. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970). Additionally, the mere display of proscribed materials in a manner allowing juveniles access violates the statute. To avoid criminal liability, the Booksellers must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful.

If the Booksellers attempt to comply with the amendment, they face economic injury; if the booksellers continue to conduct their business in their normal fashion,

they face the prospect of prosecution.[4] Particularly applicable here is the rule that, in order to maintain standing in a first amendment case, a plaintiff does not have to expose himself to prosecution when a statute imposes a criminal penalty. When the threat of prosecution is not chimerical, it is sufficient that he claims that the statute deters the exercise of constitutionally protected rights. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).[5]

In short, we find that the Booksellers meet the requirements for standing in this case.

II.

Turning to the underlying first amendment issue, there is no question that a state government has an interest in shielding minors from some sexually explicit materials which are not considered obscene as to adults. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968). The *Ginsberg* Court

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[4] The facts of this case distinguish it from our recent decision in *Doe v Duling*, No. 85-1326 (4th Cir. Feb. 7, 1986), which challenged on privacy grounds a nineteenth century fornication statute which had not been enforced in private homes for years, if not decades. In the instant case, the amendment is newly enacted. It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced. Additionally, this is a first amendment case. In the context of threats to the right of free expression, courts justifiably often lessen standing requirements. As the Supreme Court said in a recent discussion of this issue, in first amendment cases "the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Secretary of State of Maryland v. J. H. Munson Co.*, 104 S.Ct. 2839, 2847 (1984). *See Upper Midwest Booksellers Assoc. v. City of Minneapolis*, 780 F.2d 1389, 1391 n.5 (8th Cir. 1985).

[5] The Commonwealth also attacks the standing of the various trade associations to sue as representatives of their member retail and wholesale businesses. The prerequisites for associational standing set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 33, 342-43 (1977) are present in this case, and we see no merit to this aspect of the Commonwealth's argument.

upheld a New York law prohibiting the sale to minors of sexually explicit materials which were defined as harmful to juveniles. The pre-amendment Virginia statute was modeled after the statute sanctioned in *Ginsberg*.[6] The Booksellers, however, do not attack the constitutionality of the pre-amendment statute. They assert, instead, that the display provision of the amendment will unreasonably restrict adult access to materials protected under the first amendment. *See American Booksellers Association, Inc. v. McAuliffe*, 533 F. Supp. 50, 56 (N.D. Ga. 1981).

The Commonwealth concedes that adults' first amendment rights cannot be limited by the restrictive obscenity standards which may be applied to juveniles. *Butler v. Michigan*, 352 U.S. 380 (1957).[7] It contends, nevertheless, that the stricter standards of the amendment's display provision can be applied so as to screen juveniles from potentially harmful material without infringing on the rights of adults to have access to the same sexually explicit material. It argues that the district court erred when it found that the statute under review does not accommodate the state's interest in protecting juveniles in the least restrictive fashion and that the amendment is facially overbroad.

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[6] The General Assembly modified the definition of materials considered harmful to juveniles to parallel the obscenity standards detailed in *Miller v. California*, 413 U.S. 15 (1973).

[7] We also question whether an older minor's first amendment rights can be limited by the standards applicable to younger juveniles. "[M]inors are entitled to a significant measure of First Amendment protection" and the government may restrict these rights "only in relatively narrow and well-defined circumstances." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). These restrictions are justified when a child is not possessed of a full capacity for individual choice, and, in assessing that capacity, the age of the minor is a significant factor. *Id.* at 214 n.11. While the pre-amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application.

A court will not find a statute facially invalid unless: (1) it cannot easily be given a narrowing construction; and (2) it has both a real and substantial deterrent effect on protected expression. *Erznoznik*, 422 U.S. at 216. The Commonwealth urges that narrowing construction were readily available to the district court. Specifically, it asserts that the prohibited materials can still be stocked by the Booksellers so long as the materials are displayed in a manner whereby juveniles cannot examine and peruse them.

The Commonwealth asserts that the amendment is a valid time, place, and manner regulation such as the zoning ordinance upheld in *Young v. America Mini Theatres, Inc.*, 427 U.S. 50 (1976). While it is true that the Supreme Court has upheld reasonable time, place, and manner restrictions, the speech so regulated either occurred in the public forum or was subject to a general zoning ordinance. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984); *Young*, 427 U.S. 50. The state's interest in regulating activities in public places is, of course, of a somewhat different character than its interest in what goes on in a private bookstore. Even under the time, place, and manner analysis, however, the amendment must fall because the governmental interest asserted in this type of regulation must not involve the content of the regulated speech. *Clark*, 468 U.S. 288. There is no question that the Virginia amendment imposes restrictions based on the content of publications.

The amendment's most serious flaw, however, is its breadth. A demonstrably overbroad regulation may act as a deterence to the exercise of constitutionally protected rights. *Erznoznik*, 422 U.S. at 216. In the instant case, the amendment's language is broad, and it does not provide any

potential defenses or methods of compliance.[8] The Commonwealth, nonetheless, asserts that compliance with the amendment would not deter the exercise of first amendment rights. It stresses that only a small percentage of the inventory in book stores could be classified as harmful to juveniles and argues that retail outlets can readily modify their display methods to comply with the amendment. Because of its recent passage, no one has yet been prosecuted under the Virginia amendment. Additionally, there was little specific evidence presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions.[9] It cannot be gainsaid, however, that book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale. *See American Booksellers Association, Inc. v. Webb*, 590 F. Supp. 677, 692-93 (N.D. Ga. 1984).

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[8] As we note, *infra*, we disagree with the rationale of some cases which hold that otherwise constitutionally offensive "display" provisions can be legitimized by specifying certain restrictive display methods as being acceptable under the statute. Technically, however, the ordinance upheld in *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983), is distinguishable from the Virginia statute which we review in that it specifically provides that material kept behind "blinder racks" was not deemed to have been "displayed." Similarly, retailers were able to comply with the ordinance in *Upper Midwest Booksellers*, 780 F.2d 1389, by placing the materials behind opaque covers, in sealed wrappers, or in "adults only" settings.

[9] The district court heard testimony from three witnesses in order to "flesh out" the pleadings and provide a more complete record. The bookstore owners testified that they felt between 30 and 50% of their inventory was covered by the display provision. The Commonwealth argues that only a "minuscule percentage" of the plaintiffs' inventory would be involved. The district court found that a significant percentage of the inventory of the average general bookstore, varying between 5 and 25%, falls within the amendment's restrictions.

The Commonwealth suggests a number of ways by which the book retailer may solve these problems, but none appears to us to significantly ease the first amendment burden created by the amendment. The display methods suggested by the Commonwealth appear either insufficient to comply with the amendment or unduly burdensome on the first amendment rights of adults, and, to this extent, we disagree with the rulings in *M. S. News* and *Upper Midwest Booksellers*. Placing "adults only" tags on books and magazines or displaying the restricted material behind blinder racks or on adults only shelves freely accessible in the main part of the store would not stop any determined juvenile from examining and perusing the materials. The statute requires that such materials not be displayed so that minors *may* have access to them. Forcing a bookseller to create a separate, monitored adults only section, requiring that the materials be sealed, or taking the materials off display and keeping them "under the counter" unreasonably interferes with the booksellers' right to sell the restricted materials and the adults' ability to buy them. Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices. Contrary to the Commonwealth's argument that the scienter requirement in the statute allows a book retailer to avoid the hazards of self censorship, each of these suggested practices would require the seller to read and make a content based judgment on each item on his shelves in order to select the ones requiring special treatment. More importantly, a retailer cannot rely on the amendment to guide him in deciding what are the least restrictive modifications in display methods which would be sufficient to satisfy the statute.

In sum, we feel that the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to withstand an overbreath challenge. We, therefore, affirm the district court's judgment declaring the challenged amendment unconstitutional and enjoining its enforcement.

III.

The Booksellers appeal the district court's denial of their application for attorneys' fees pursuant to 42 U.S.C. § 1988. The prevailing party in a § 1983 action should ordinarily recover attorneys' fees absent special circumstances which would render the award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). The district court's normally broad discretion in this area is narrowly limited both by the reasoning of *Newman* and by Congress' later explicit approval of that standard in enacting the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In denying the plaintiffs' application, the district court noted that the Booksellers could pass on the cost of litigation to their customers in the form of higher prices, that the Commonwealth acted in good faith, and that the Booksellers were the primary beneficiaries of the action striking down the statute. The court recognized that none of these factors alone would constitute the necessary special circumstance to justify denial of attorneys' fees. It held, however, that "with all these factors combined, the Court finds it more equitable to let the costs lie where they land." The district court cited no authority for the action, and we find none.

Although the Booksellers certainly benefit from the results of this litigation, the citizens of Virginia will likewise continue to enjoy unfettered freedom of expression. We do not find it unjust that the taxpayers will have to bear the costs of the award. *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979).

As to defendants Strobel and Stover, however, we feel that circumstances would make the award of attorney fees against them unjust. At the time of their involvement there was, of course, no court interpretation concerning the constitutionality of the Virginia statute. Their actions were pursuant to a duly enacted state statute, and when they were named as defendants, they did not defend the statute on its merits as did the intervening Commonwealth.

In view of the above, the district court's denial of attorney fees is reversed insofar as it related to the Commonwealth of Virginia, and is remanded to the district court with instructions to assess attorney fees against the Commonwealth. The district court's decision denying attorney fees against defendants Strobel and Stover is affirmed.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

FILED SEP 26, 1986
U.S. Court of Appeals
Fourth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1961
No. 85-1999
No. 85-2284

American Booksellers Association, Inc., et al,

Appellees,

versus

Commonwealth of Virginia, et al,

Appellants.

and

Charles T. Strobel, et al,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc is denied by a panel consisting of Judges Phillips, Sprouse and Haynsworth.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Widener, Russell, Chapman and Wilkins voted in favor of rehearing in banc; and Judges Winter, Hall, Phillips, Murnaghan, Sprouse and Ervin voted against rehearing in banc. Judge Wilkinson noted he was disqualified. The majority of the Judges having voted against rehearing in banc, it is ordered that rehearing in banc is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judges Phillips, Sprouse and Haynsworth.

For the Court,

/s/ JOHN M. GREACEN
CLERK

FILED
OCT 7, 1986
U.S. Court of Appeals
Fourth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 85-1961
NO. 85-1999
NO. 85-2284

American Booksellers Association, Inc., et al,

Appellees,

versus

Commonwealth of Virginia, et al,

Appellants,

and

Charles T. Strobel, et al,

Defendants.

ORDER

Upon consideration of the appellants' motions for a stay of mandate,

IT IS ORDERED that the motions for a stay of mandate are granted and the mandate is hereby stayed pending timely application to the United States Supreme Court for a writ of certiorari.

Entered at the direction of Judge Sprouse with the concurrence of Judge Phillips and Judge Haynsworth.

For the Court,

/s/ JOHN M. GREACEN
CLERK

FILED
SEP 10, 1985
Clerk, U.S. District Court
Alexandria, Virginia

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICAN BOOKSELLERS ASSOCIATION, et al.,

Plaintiffs,

v. Civil Action No. 85-816-A

CHARLES T. STROBEL, Director of Public Safety, et al.,

Defendants.

ORDER

This matter comes before the Court on defendants' motion to dismiss, and on a trial to the bench on August 5, 1985. For reasons stated in the accompanying memorandum opinion, the defendants' motion to dismiss is GRANTED as to plaintiffs Jessica and Amy Bush, and DENIED as to the other plaintiffs.

Furthermore, for reasons stated in the accompanying memorandum opinion, the Court FINDS in favor of the plaintiffs, DECLARES the 1985 Amendment to Virginia Code § 18.2-391 unconstitutional, and PERMANENTLY ENJOINS the defendants from enforcing the amendment.

Let the Clerk send a copy of this order to all counsel of record.

Date: 9/10/85

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

FILED
SEP 10, 1985
Clerk, U.S. District Court
Alexandria, Virginia

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

AMERICAN BOOKSELLERS ASSOCIATION, et al.,

Plaintiffs,

v. Civil Action No. 85-816-A

CHARLES T. STROBEL, Director of Public Safety, et al.,

Defendants.

MEMORANDUM OPINION

Introduction

This matter comes before the Court on a trial to the bench on September 5, 1985. Plaintiffs challenge the constitutionality of the 1985 Amendment to § 18.2-391 of the Code of Virginia. The relevant statutes are set out below, and the challenged portion (hereafter "the amendment") is highlighted:

§ 18.2-390. Definitions.—As used in this article:

(1) "Juvenile" means a person less than eighteen years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual

stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to Juveniles" means that quality of any description or representation, in whatever form, or nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

§ 18.2-391. Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor.

The named defendants are charged by law with the duty of enforcing the challenged portion of the statute. The Attorney General of Virginia has exercised his right to intervene pursuant to 28 U.S.C. § 2403(b).

The plaintiffs here are five bookstore trade associations, two individual bookstores and two individual residents of the City of Alexandria. They contend that the 1985 Amendment is facially invalid in that it unconstitutionally infringes upon rights protected by the first amendment, and in that it constitutes a prior restraint upon free speech. Defendants argue that there is no case or controversy between themselves and the plaintiffs, that plaintiffs do not have standing to challenge the Amendment, that the Court should abstain from considering the constitutionality of the Amendment, and that in any event the Amendment does not violate the first amendment.

Pursuant to Rule 52(a), the Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Helen Ross is the owner of plaintiff Ampersand Books, an Alexandria bookstore belonging to the American Booksellers Association. Ampersand Books carries approximately 12,000-13,000 different titles at any one time, with multiple copies of most titles. The books are arranged in sections according to subject matter, including children's books, science fiction, mystery, fiction, romance, art, health, photography and best sellers. Children frequently shop at Ampersand Books, often with their parents, and sales of children's books constitute approximately 10% of Ampersand's business. In terms of its size, structure and clientele, Ampersand is similar to many other Northern Virginia bookstores that carry a wide variety of titles.

Carol Johnson is the owner of plaintiff Books Unlimited, an Arlington bookstore that belongs to the American Booksellers Association. Books Unlimited is somewhat atypical in that it relies more heavily upon sales of children's books than other area bookstores. However, approximately 10-15% of its books may not be displayed under the new law. The store's books are arranged by subject matter in a manner similar to the structure at Ampersand Books.

In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and desire to purchase it only after browsing and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content. Therefore, at least one copy of every title carried by Ampersand Books is on display.

Based upon the testimony of two local bookstore owners, and after carefully reviewing the exhibits introduced from their stores, the Court concludes that the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are "harmful to juveniles" as defined in the statute. The books that fall within the restrictions come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health. Most of these books come within the statute's fairly broad ambit on the basis of their content. However, the Court finds that the covers of some books and magazines, as sexually explicit "pictures" and "photographs" under the statute, are also covered by the statute.

In order to comply with the 1985 amendment, bookstores are faced with approximately four choices. First, a bookstore could simply bar all persons under the age of 18 from its store. However, this alternative would certainly

have a dramatic impact upon the store's sales of children's books. Moreover, such a move would create the impression that the store deals primarily in "adult only" or pornographic material, which would have a devastating impact upon the store's business.

Second, the store could create an "adult only" section in order to display the proscribed material. However, the books covered by the statute come from a wide variety of literary disciplines, such as fiction, romance, photography, and best sellers; books which are "harmful to minors" are mixed into so many different subject areas that it would be almost impossible for booksellers to sort through the books to create a new section. An "adult only" area would be costly to create, difficult to monitor, and would create a great deal of confusion in the mind of a consumer searching for a particular book. Moreover, many adults would be reluctant and embarrassed to browse in an "adults only" corner of the store, and sales of books placed in this new area would undoubtably drop.

Third, the bookstore could simply limit its inventory to books not regulated by the new law. However, since the new law would restrict the display of a number of very popular books, including some best sellers, this alternative is not commercially feasible. In addition, this alternative would create practical difficulties in ordering new books because bookstores rarely have the opportunity to review books before ordering them.

Finally, the bookstore could place all of the prescribed material behind a counter where they would not be displayed to the public. However, due to the large number of books involved, this alternative would require bookstores to significantly alter the structure of their stores. Moreover, since the display of books is so crucial to their sale, such a move would substantially hurt sales.[1]

CONCLUSIONS OF LAW

A. Case or controversy and standing requirements

Initially, the Court must determine whether an actual case or controversy exists, and whether the plaintiffs have standing to challenge the constitutionality of the new amendment. The "case or controversy" doctrine does not mean that a plaintiff must be arrested or prosecuted before he or she may challenge the constitutionality of a statute. *Steffel v. Thompson,* 415 U.S. 452 (1974). However, a plaintiff must be able to assert a reasonable fear of enforcement of the statute, and that therefore the allegedly unconstitutional statute interferes with how the plaintiff ordinarily conducts his or her affairs. *Entertainment Concepts, Inc., III v. Maciejewski,* 631 F.2d 497 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981); *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809 (5th Cir. 1979).

Similarly, in order to satisfy the requirement of standing, a litigant must demonstrate that he or she is somehow adversely affected by the challenged statute. This requirement is not satisfied if the party merely asserts the common interest of society as a whole in having a judicial determination on the matter. In short, a litigant must demonstrate a "personal stake" in determining the validity of the law, so that the controversy before the Court is both "real and substantial." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (1937).

Where first amendment rights are at stake, case or controversy and standing requirements have been relaxed so that litigants may preserve rights of free expression. *See Secretary of State v. Munson,* ___U.S.___, 81 L.Ed 2d 736, 796 (1984) ("where there is a danger of chilling free speech, the concern that constitutional adjudication be avoided wherever possible may be outweighed by society's interest in having the statute challenged"); *see also Broadrick v. Oklahoma,* 413 U.S. 601, 611 (1973) (challenge to statute

restricting political activities of state civil servants permitted since the statute's existence may discourage persons not before the Court from engaging in protected speech). This relaxed stance reflects the treasured position occupied by the first amendment, and the consequent importance of having first amendment controversies adjudicated promptly.

The evidence in the record clearly establishes that a real controversy exists and that the individual bookstores have standing to challenge the 1985 amendment. The bookstores have adequately demonstrated a reasonable fear that the challenged amendment will be enforced against them, that the amendment raises substantial first amendment concerns, and that the amendment has caused and will continue to cause direct, immediate economic injury to their businesses. Furthermore, the retail associations also have standing in this matter because they are representatives of bookstores who are suffering immediate or threatened injury as a direct result of the challenged statute. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) (trade association has standing to bring suit on behalf of its members if its members would otherwise have standing, if the interests to be protected are germane to the purpose of the organization, and if the suit does not require the participation of the individual members); *see also Warth v. Selden,* 422 U.S. 490 (1975).

The individual plaintiffs, Jessica Bush and her minor daughter Amy Bush do not have standing to challenge the amendment. Jessica and Amy Bush claim that they have standing simply as adult and juvenile members of the community. However, neither has alleged that they would be subject to prosecution under the challenged amendment, nor do they allege any economic loss as a result of the new law. The Bushes have failed to assert anything more than an abstract interest in the availability of reading materials in bookstores, an interest which is no different from the interests of all other local citizens who patronize bookstores. *See American Booksellers Association v. Rendell,* 481 A.2d 919, 932 (Pa. Super. 1984).

B. Abstention

Defendant contends that the Court should abstain in this case so that state courts may be given the opportunity to construe the 1985 amendment and determine its constitutionality. However, this case does not fit within any of the three narrowly defined areas where abstention by a federal court may be appropriate. Specifically, state court resolution of this matter would not render unnecessary, nor substantially modify the federal constitutional questions; there are simply no difficult or unclear issues of state law raised here. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention may be appropriate where the case presents unsettled questions of state law); *see also Younger v. Harris*, 401 U.S. 37 (1971) (abstention may be appropriate where there is a constitutional challenge to ongoing state criminal proceedings); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (abstention may be appropriate where there is an adequate state regulatory forum for review of the claims, and where that forum is the most appropriate forum due to the presence of basic state policy considerations). Further, the significant first amendment questions raised by the plaintiffs' claims clearly make abstention inappropriate. *See American Booksellers Association v. McAuliffe*, 533 F.Supp. 50 (N.D. Ga. 1981) (declaring Georgia statute restricting display of certain sexually explicit materials unconstitutional).

Overbreadth

As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The Supreme Court has upheld restrictions based upon content "only in the most extraordinary circumstances." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983). Therefore, the challenged amendment, which clearly restricts access to certain materials on the basis of

their content, must be carefully examined to ensure that it does not impermissibly infringe upon first amendment values.

The sole justification offered by the defendants for the challenged amendment is the government's interest in shielding minors from certain adult reading material.[2] The Supreme Court, recognizing that the state may play some role in promoting the moral well-being of its youth, has upheld the constitutionality of laws which prohibit the *sale* of materials which, though not obscene as to adults, were deemed to be "harmful to minors." *Ginsberg v. New York*, 390 U.S. 629 (1968).[3] The defendants assert that the 1985 amendment, which prohibits the *display* of non-obscene material in a manner whereby one under the age of 18 *may* peruse it, is constitutionally permissible under *Ginsberg*.

The Court disagrees. In promoting the morals of its youth by restricting their access to certain communications, the state may not create barriers which simultaneously place substantial restrictions upon an adult's access to those same protected materials. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Supreme Court struck down a Michigan law which made it unlawful for anyone to "make available for the general reading public . . . a book . . . found to have a potentially deleterious influence on youth." 352 U.S. at 382-83. Writing for a unanimous Court, Justice Frankfurter rejected a contention similar to the one offered by the defendants here:

> The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.

352 U.S. at 383. Here, as in *Butler*, the challenged statute is "not reasonably restricted to the evil with which it is said to deal." *Butler*, 352 U.S. at 383.

Over 25 years after *Butler*, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Supreme Court struck down a federal statute which made it illegal to mail to the public unsolicited materials dealing with contraceptives, venereal disease and family planning. The defendant in *Bolger*, like the defendant in *Butler*, argued that the law should be upheld because it protected minors from materials that their parents might find objectionable. The Supreme Court again unanimously rejected this contention:

> We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children.' *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957). The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

__U.S. at __, 103 S.Ct. at 2884. *See also Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (statute prohibiting the distribution of sexually explicit materials over cable television declared unconstitutional on grounds of overbreadth).

The level of discourse reaching commercial bookshelves cannot be limited to what might be appropriate for an elementary school library. *See American Booksellers Association, Inc. v. McAuliffe*, 533 F.Supp. 50 (N.D. Ga. 1981); *Tattered Cover v. Tooley*, 696 P. 2d 780 (Col. Sup. Ct. 1985); *American Booksellers Association, Inc. v. Superior Court*, 129 Cal. App. 3d 1971, 181 Cal. Rptr. 33 (1982). The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain "harmful" materials, the

unavoidable collateral effect of the law is to severely limit the ability of adults to examine these protected materials. This, in turn, severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible.

Faced with the restrictions in the display amendment, a bookstore would be forced either to discontinue carrying the restricted materials, ban minors from its store altogether, or restructure their stores and move a significant portion of its inventory. Due to the wide sweep of the statute, a number of classic literary works, romances, and best sellers would have to be placed behind the counter or into monitored "adults only" areas. As noted earlier, these alternatives are commercially impractical. Moreover, they force adults to use other means (beyond simply browsing through the shelves) to find out about protected literature. Finally, they might also require the adult to go into a stigmatized "adults only" area to examine the materials; these extra steps would certainly be embarrassing to many adults, and they may very well inhibit many individuals from exercising their right to examine and purchase the material.

The Attorney General suggests that a bookseller may comply with the amendment by simply placing tags on the prescribed books, or by placing them on special "adult only" racks. This interpretation completely ignores the plain language of the new law, which restricts the *display* of the proscribed materials, not simply their perusal. If the proscribed material is on a shelf in an area where juveniles are permitted to roam, then the item is "on display" where the juvenile "may" examine it even if the item is tagged. Indeed, since the material may well have pictures or passages "harmful to minors" on its front or back cover, the law is violated if a person under the age of 18 can simply see it. The amendment makes no provision for tags, adults only racks or blinder racks.

The Attorney General also urges the Court to uphold the challenged display provision as a valid time, place and manner restriction on speech. The "crucial question" in examining a regulation under the time, place and manner test is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). The manner of expression here—the display of the books or other materials—is unquestionably compatible with the activity of the places affected by the rgulation—bookstores, art galleries, convenience stores and department stores. Because the amendment does not regulate expression incompatible with the normal activity of the affected businesses, the amendment here is not a valid time, place and manner restriction.[4]

Moreover, a valid time, place or manner restriction must serve a substantial government interest, and it must be drawn with narrow specificity to be no more restrictive of protected communications than necessary.[5] *Grayned v. City of Rockford,* 408 U.S. 104, 116-117 (1972); *Davenport v. City of Alexandria,* 710 F.2d 148 (4th Cir. 1983). While the purpose of the restriction here is to serve a substantial governmental interest, the restriction is far broader than necessary. Without passing upon the constitutionality of any alternative measures, the Court notes that a law simply forbidding the actual perusal by minors of these harmful materials, or at least requiring the use of "blinder racks,"[6] would be far narrower than the amendment challenged here.[7]

Plaintiffs also challenge the Virginia law on the grounds that it constitutes a prior restraint upon protected speech, and that it unreasonably restricts the access of more mature minors to material which is not obscene as to them. The Court's rulings on plaintiff's overbreadth claim makes it unnecessary to reach the merits of these contentions.

In light of the foregoing, the Court concludes as a matter of law that the 1985 amendment to Virginia Code § 18.2-391(a) is facially invalid for overbreadth. Moreover, it cannot be saved by any narrowing construction. Therefore, the defendants are hereby PERMANENTLY ENJOINED from enforcing the amendment.

An order will be entered in accordance with this opinion.

Footnotes

[1]The Court notes with some concern that, with respect to most of the above alternatives, bookstores might not be able to continue their practice of hiring minors for part time positions.

[2]Obviously, the materials regulated by the Amendment are not "obscene" under *Miller v. California*, 413 U.S. 15, 24 (1973), and are therefore entitled to first amendment protection.

[3]The *Ginsberg* decision, as modified by *Miller*, has been codified by Virginia in Virginia Code § 18.2-390, 391 (1984).

[4]To the extent that the Court in *M. S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) held that a somewhat similar Wichita City ordinance was a valid time, place and manner restriction, the Court respectfully disagrees.

[5]Although valid time, place and manner restrictions must generally be content neutral, the Supreme Court has carved out an exception to this general rule where, as here, the restriction is targeted toward a juvenile audience. *See Young v. American Mini Theatres*, 427 U.S. at 85-86 (Justice Stewart, dissenting).

[6]In the *Casado* case, the 10th Circuit upheld the constitutionality of a display ordinance somewhat similar to the regulation before this Court. However, in *Casado*, the challenged ordinance permitted the display of materials "harmful to minors" so long as the materials were kept behind "blinder racks" that covered the lower two-thirds of the material from view.

[7]It may be that laws prohibiting the sale of these materials are already the narrowest permissible restrictions, and that displays of such materials are simply a part of the "multitude of external stimuli" in sensitive areas with which parents must cope. *See Bolger*, 463 U.S. at 73.

Let the Clerk send a copy of this memorandum opinion to all counsel of record.

DATE: 9/10/85

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICAN BOOKSELLERS
ASSOCIATION, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, et al.,
Defendants.

ORDER

This matter is before the Court on plaintiffs' application for costs, pursuant to 42 U.S.C. 1988. Defendants have objected to plaintiffs' application and have requested that the fees demanded be reduced. For the reasons stated below, the Court DENIES plaintiff's application and disallows all fees.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in any action under 42 U.S.C. Section 1983, the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988. In exercising its discretion, the court is controlled by the standard set forth in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Under that standard, a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." 390 U.S. at 402. *See also Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In this case, the Court finds just such special circumstances.

This case, *American Booksellers*, was a carefully orchestrated attack on a Virginia statute. The statute at issue made it unlawful to display commercially certain materials

deemed harmful to juveniles in such a manner that children could examine and peruse them. *See* Sections 18.2-390 to 391 of the Virginia Code. This statute peculiarly affected one entity, the bookselling industry, and it was that industry that masterminded the assault. Through its attorneys, the industry carefully selected a broad spectrum of litigants to ensure standing. The original plaintiffs included five bookstore trade associations, two individual bookstores and two individual residents of the City of Alexandria. It chose a forum it considered desirable, *i.e.*, one of the more liberal sections of the state, where success at trial was considerably less [sic] likely. And, perhaps most importantly, it filed a 1983 action, even though a declaratory action based on the First Amendment itself would have been more than sufficient. The added attraction of 1983, of course, was the provision for attorneys fees.

When the battle was over and the statute struck down, the beneficiary was, once again, the bookselling industry. With the statute on the books, the industry had faced a massive loss of profits but, through this suit, it managed to protect these revenues. In other words, from the beginning, this case was a suit by a private industry, for a private industry. It is that industry that should now bear the expense, simply as a cost of doing business. To do otherwise would be unfair. The taxpayers should not have to bear the expense of a suit that redounded to the benefit of one industry and one industry alone.

The Court does not mean to suggest that the bookselling industry acted improperly in bringing this case. Nor does it mean to downgrade the importance of this case or the principles it upholds. Freedom of speech and thoughts are of paramount importance and admittedly work to everyone's benefit. However, to the extent that the public benefited, it can pay for that benefit through a one or two cent increase in the price of books. This would effectively spread the cost of the suit and seems more equitable than saddling the State with the bill. The State here acted in good faith, in support of a cause that all must find worthy—the

protection of children. Moreover, the State could not have known that its actions would be found to be unconstitutional since this is a novel area of law.

The Court realizes that probably none of these factors standing alone would justify shielding the State from paying attorney fees. For instance, the law is clear that good faith by itself is not a special circumstance that would make an award of attorney fees unjust. *See, e.g., Anderson v. Morris,* 658 F.2d 246 (4th Cir. 1976). However, with all these factors combined, the Court finds it more equitable to let the costs lie where they land. Those who have benefited the most (which includes the book-buying public) will pay the slight cost of that benefit, and the State will not be penalized for its well-intentioned effort to protect its children.

Let the Clerk send a copy of this order to all counsel of record.

DATE: Oct. 23, 1985

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

FILED
JUL 22, 1985
Clerk, U.S. District Court
Alexandria, Virginia

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

AMERICAN BOOKSELLERS
ASSOCIATION, INC., *et al.*
Plaintiffs,

v. Civil Action No. 85-816A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, *et al.*
Defendants.

ORDER AND CERTIFICATION OF CONSTITUTIONAL QUESTION

This matter is before the Court on Plaintiffs' Application for a Temporary Restraining Order, seeking to enjoin enforcement by Defendants of an amendment to Section 18.2-391 of the Code of Virginia pending a decision on the merits of this case. Counsel for all parties have appeared and have been heard, and it now is ORDERED that:

1. The Application for a Temporary Restraining Order be, and hereby is, continued, based upon representations by defense counsel that Defendants will voluntarily refrain from enforcing said Amendment pending further proceedings herein; *provided, however* that counsel for Plaintiffs may, by telephone application or otherwise, renew their request for interim relief in the event circumstances so warrant;

2. It appearing to this Court that, pursuant to 28 U.S.C. § 2403(b), this is an action wherein the constitutionality of a statue of the Commonwealth of Virginia affecting the public interest has been drawn into question, it is hereby

ORDERED that such fact be, and hereby is, certified to the Attorney General of the Commonwealth, who shall be provided copies of the Complaint and Motions filed herein, and be permitted to intervene on behalf of the Commonwealth, to present evidence and to argue the question of constitutionality, if, in his discretion, such intervention is necessary and proper.

3. It is further ORDERED that the Attorney General advise the Court, and all counsel, of his decision regarding intervention no later than July 26, 1985; that, in the event the Attorney General does intervene, he file any pleadings and memoranda by August 2, 1985; and that the hearing for a preliminary injunction in this matter be scheduled for 10:00 a.m. on August 9, 1985.

July 22, 1985 — /SGD/ Richard L. Williams
Richard L. Williams
Date — U.S. District Court Judge

Copies to: All Counsel of Record
Attorney General of Virginia

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMERICAN BOOKSELLERS
ASSOCIATION, INC., et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, et al.,
Defendants.

MOTION TO INTERVENE

Comes now the Attorney General of Virginia, by counsel, and moves this Court pursuant to Rule 24(a) and (c), *Federal Rules of Civil Procedure,* to allow him to intervene on behalf of the Commonwealth of Virginia under 28 U.S.C. § 2403(b) in this action wherein the constitutionality of the 1985 amendment to § 18.2-391 of the Code of Virginia, which affects the public interest, has been drawn into question.

Respectfully submitted,

ATTORNEY GENERAL OF VIRGINIA,

By: /s/ Richard B. Smith
Counsel

Richard B. Smith
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 1985, a copy of the foregoing Motion To Intervene was filed with the United States District Court for the Eastern District of Virginia and that copies thereof were mailed to Victor M. Glasberg, Esquire, 1007 King Street, P. O. Box 1610, Alexandria, Virginia 22313, and to Robert S. Plotkin, Esquire, 1140 Connecticut Avenue, No. 400, Washington, D.C. 20036, Counsel for Plaintiffs. Copies were also mailed to Ara M. Tramblian, Assistant County Attorney, 1400 North Courthouse Road, Room 106, Arlington, Virginia 22201, Counsel for Defendant William K. Stover, and to Robert L. Murphy, Deputy City Attorney, City Attorney's Office, City Hall, Alexandria, Virginia 22314, Counsel for Defendant Charles T. Strobel.

/s/
Richard B. Smith
Assistant Attorney General

FILED
NOV 19, 1985
Clerk, U.S. District Court
Alexandria, Virginia

APPENDIX H

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

AMERICAN BOOKSELLERS
ASSOCIATION, INC., et al.
Plaintiffs,

v. Civil Action No. 85-0816-A

CHARLES T. STROBEL, et al.
Defendants.

ORDER

This matter is before the Court on Plaintiffs' motion for reconsideration of denial of attorneys' fees. For reasons stated from the bench, the Court hereby DENIES plaintiffs' motion.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

DATE: Nov. 19, 1985

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

AMERICAN BOOKSELLERS
ASSOCIATION, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR OF PUBLIC SAFETY, et al.,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Attorney General of Virginia, intervenor herein, hereby appeals to the United States Court of Appeals for the Fourth Circuit from this Court's Order of the 10th day of September, 1985, declaring the 1985 Amendment to Virginia Code § 18.2-391 unconstitutional and permanently enjoining the defendants herein from enforcing the amendment.

ATTORNEY GENERAL OF VIRGINIA,
Intervenor herein.

By: /s/ Richard B. Smith
Counsel

Richard B. Smith
John H. McLees, Jr.
Assistant Attorneys General

101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 1985, copies of the foregoing Notice of Appeal were mailed to Victor M. Glasberg, Esquire, 1007 King Street, P.O. Box 1610, Alexandria, Virginia 22313, and to Robert S. Plotkin, Esquire, 1140 Connecticut Avenue, No. 400, Washington, D.C. 20036, Counsel for Plaintiffs. Copies were also mailed to Ara M. Tramblian, Assistant County Attorney, 1400 North Courthouse Road, Room 106, Arlington, Virginia 22201, Counsel for Defendant William K. Stover, and to Robert L. Murphy, Deputy City Attorney, City Attorney's Office, City Hall, Alexandria, Virginia 22314, Counsel for Defendant Charles T. Strobel.

/s/ Richard B. Smith
Assistant Attorney General

APPENDIX J

28 U.S.C. § 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. § 2202

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX K

Va. Code § 18.2-390

Definitions.—As used in this article:

(1) "Juvenile" means a person less than eighteen years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to Juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

Va. Code § 18.2-391

Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor.

APPENDIX L

Many states have laws concerning the display or exhibition of pornographic materials to juveniles, and no doubt many local jurisdictions have such provisions as well. A list of state laws on this subject is as follows:

Ala. Code §§ 13A-12-171, -174 (1982)
Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (1978)
Colo. Rev. Stat. §§ 18-7-501, -502 (Supp. 1983)
Del. Code Ann. Tit. 11, §§ 1361, 1365 (1979)
Fla. Stat. Ann. §§ 847.012, .013 (West 1976 & Supp. 1984)
Ga. Off. Code Ann. §§ 16-12-102 to 104
Ind. Code § 35-49-3-3 (Supp. 1986)
La. Rev. Stat. Ann. § 14:91.11 (Supp. 1984)
Me. Rev. Stat. Ann. Tit. 17, § 2911 (1983 & Supp. 1983-84)
Md. Ann. Code Art. 27, § 419 (1982 & Supp. 1983)
Miss. Code Ann. §§ 97-5-27, -29 (Supp. 1983)
Mo. Ann. Stat. §§ 573.040, .060 (Vernon 1979)
Mont. Code Ann. §§ 45-8-201, -202 (1983)
Neb. Rev. Stat. §§ 28-807, -808, -809 (1979)
Nev. Rev. Stat. §§ 201.256 to .265 (1957)
N.J. Stat. Ann. §§ 2C:34-3, -4 (West 1982)
N.M. Stat. Ann. §§ 30-37-1, -2, -3 (1980)
N.Y. Penal Law § 245.11 (McKinney 1980)
N.C. Gen. Stat. §§ 14-190.13, .14 (Supp. 1985)
N.D. Cent. Code § 12.1-27.1-03.1 (Repl. Vol. 1985)
R.I. Gen. Laws § 11-31-10 (Supp. 1983)
S.C. Ann. §§ 16-15-290, -390 (Supp. 1983)
S.D. Codified Laws Ann. §§ 22-24-27, -29.1, -30 (1979)
Tenn. Code Ann. § 39-6-1136 (1982)
Tex. Penal Code Ann. § 43.24 (1974)
Va. Code § 18.2-391 (1982)
Vt. Stat. Ann. Tit. 13, § 2804b (Supp. 1983)
W.Va. Code §§ 61-8A-1, -2

These state laws vary in language. Those corresponding fairly closely to Virginia's statutory scheme are the following ones:

Ala. Code §§ 13A-12-170, -171 (1982)
Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (West Supp. 1978)
Fla. Stat. Ann. §§ 847.012, .013 (West 1976 & Supp. 1984)
Ga. Code Ann. §§ 16-12-102 to 16-12-104
Ind. Code § 35-49-3-3 (Supp. 1986)
N.M. Stat. Ann. §§ 30-37-1, -2, -3 (1980)
N.C. Gen. Stat. §§ 14-190.13, .14 (Supp. 1985)
N.D. Cent. Code § 12.1-27.1-03.1 (Repl. Vol. 1985)
R.I. Gen. Laws § 11-31-10 (Supp. 1983)
Vt. Stat. Ann. Tit. 13, § 2804b (Supp. 1983)

Localities with display provisions include the cities of Minneapolis, Wichita and Philadelphia.

86-1034

NO. 86-1024

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

MARY SUE TERRY
Attorney General of Virginia

*RICHARD B. SMITH
Assistant Attorney General

MARK R. DAVIS
Assistant Attorney General

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-6564
Counsel for Appellant

*Counsel of Record

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

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PUBLISHED

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1961(L)

American Booksellers Association, Inc.; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.: Books Unlimited, Inc.; Ampersand Books;

Appellees,

versus

Commonwealth of Virginia,

Appellant.

and

Charles T. Strobel; William K. Stover,

Defendants.

No. 85-1999

American Booksellers Association, Inc.,; Association of American Publishers; Council for Periodical Distributors Assoc.; International Periodical Distributors Assoc., Inc.; National Assoc. of College Stores, Inc.; Books Unlimited, Inc.; Ampersand Books;

Appellees,

versus

William K. Stover,

Appellant,

and

Charles T. Strobel,

Defendant.

No. 85-2284

American Booksellers Association, Inc.; Association of American Publishers; Council for Periodical Distributors Association; International Periodical Distributors Association, Inc.; National Association of College Stores, Inc.; Books Unlimited, Inc. and Ampersand Books,

Appellants,

and

Amy Bush and Jessica Bush,

Plaintiffs,

versus

Charles T. Strobel; William K. Stover and the Commonwealth of Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C A 85-816-A).

Argued: February 5, 1986 Decided: June 12, 1986

Before PHILLIPS and SPROUSE, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Ara L. Tramblian, Assistant County Attorney (Charles G. Flinn, Arlington County Attorney on brief) for Appellant/cross-appellee William K. Stover; Richard B. Smith, Assistant Attorney General (William G. Broaddus, Attorney General; Mary Sue Terry, Attorney General; John H. McLees, Jr., Assistant Attorney General on brief) for Appellant/cross-appellee Comonwealth of Virginia; Michael A. Bamberger (David C. Burger; Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey on brief) for Appellees/cross-appellants.

SPROUSE, Circuit Judge:

This appeal concerns the constitutionality of a 1985 amendment to a Virginia statute which attempts to shield juveniles from the commercial display of sexually explicit material. The defendants, the Commonwealth of Virginia and William K. Stover, Chief of Police for Arlington County, Virginia, appeal from the district court's order declaring unconstitutional the amendment to Virginia Code § 18.2-391(a) and permanently enjoining them from enforcing the amendment.[1] The plaintiffs, the American Booksellers Association, Inc., four other trade associations, and two retail bookstores (hereinafter collectively referred to as the Booksellers) appeal from the district court's denial of attorneys' fees. We affirm the district court's decision that the amendment is unconstitutional, but reverse its denial of plaintiffs' attorneys' fees.

The pre-amendment statute, for some years, has prohibited the sale to minors of sexually explicit materials defined as harmful to juveniles, including some materials which are not obscene as to adults. The constitutionality of that underlying statute is not in issue in this appeal. The Virginia General Assembly amended the statute, however, effective July 1, 1985, making it unlawful to knowingly display these materials "in a manner whereby juveniles may examine and peruse" them. Va. Code § 18.2-391(a) (Supp.

[1]Charles T. Strobel, Director of Public Safety for the City of Alexandria, Virginia, was named as a defendant in the district court, but has not appealed from that court's judgment.

1985).[2] Approximately two weeks after the effective date of the amendment, and prior to any enforcement action by the defendants, the Booksellers brought this action asserting that the amendment is facially unconstitutional.[3] They sought declaratory and injunctive relief to prevent its enforcement as well as costs and attorneys' fees pursuant to 42 U.S.C. § 1988 (1982). After a hearing on the defendants' motion to dismiss, the district court declared the amendment unconstitutional and enjoined its enforcement.

The Commonwealth and Stover appeal the district court's finding that the Booksellers had standing to attack the amendment and the Commonwealth also appeals that court's ruling that the amendment is facially unconstitutional as violative of the first amendment.

---

[2] The amended section 18.2-391(a) provides that:

> It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*
>
> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
>
> (2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

(Emphasis supplied to show language added by the 1985 amendment.)

[3] The action was based on federal constitutional provisions, as well as 42 U.S.C. § 1983 (1982) and 28 U.S.C. §§ 2201 and 2202 (1982).

I.

To survive an initial attack challenging standing, a plaintiff must show that an actual controversy exists and must allege a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Commonwealth and Stover contend that the Booksellers have not demonstrated an actual case or controversy. They point out that there has been no proof that the Booksellers have been prosecuted, threatened with prosecution, or have detrimentally changed their behavior as a result of the amendment.

We agree with the district court that the Booksellers have standing to challenge the amendment. The Booksellers have shown a legitimate concern that the amendment will be implemented so as to infringe on their first amendment right of "free speech." This is more than a concern merely "held in common by all members of the public." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974). There is little doubt that compliance with the amendment threatens the Booksellers with economic injury; each of the methods of compliance suggested by the Commonwealth would interfere with the Booksellers' marketing methods. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970). Additionally, the mere display of proscribed materials in a manner allowing juveniles access violates the statute. To avoid criminal liability, the Booksellers must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful.

If the Booksellers attempt to comply with the amendment, they face economic injury; if the booksellers continue to conduct their business in their normal fashion,

they face the prospect of prosecution.[4] Particularly applicable here is the rule that, in order to maintain standing in a first amendment case, a plaintiff does not have to expose himself to prosecution when a statute imposes a criminal penalty. When the threat of prosecution is not chimerical, it is sufficient that he claims that the statute deters the exercise of constitutionally protected rights. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).[5]

In short, we find that the Booksellers meet the requirements for standing in this case.

II.

Turning to the underlying first amendment issue, there is no question that a state government has an interest in shielding minors from some sexually explicit materials which are not considered obscene as to adults. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968). The *Ginsberg* Court

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[4] The facts of this case distinguish it from our recent decision in *Doe v. Duling*, No. 85-1326 (4th Cir. Feb. 7, 1986), which challenged on privacy grounds a nineteenth century fornication statute which had not been enforced in private homes for years, if not decades. In the instant case, the amendment is newly enacted. It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced. Additionally, this is a first amendment case. In the context of threats to the right of free expression, courts justifiably often lessen standing requirements. As the Supreme Court said in a recent discussion of this issue, in first amendment cases "the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Secretary of State of Maryland v. J. H. Munson Co.*, 104 S.Ct. 2839, 2847 (1984). *See Upper Midwest Booksellers Assoc. v. City of Minneapolis*, 780 F.2d 1389, 1391 n.5 (8th Cir. 1985).

[5] The Commonwealth also attacks the standing of the various trade associations to sue as representatives of their member retail and wholesale businesses. The prerequisites for associational standing set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 33, 342-43 (1977) are present in this case, and we see no merit to this aspect of the Commonwealth's argument.

upheld a New York law prohibiting the sale to minors of sexually explicit materials which were defined as harmful to juveniles. The pre-amendment Virginia statute was modeled after the statute sanctioned in *Ginsberg*.[6] The Booksellers, however, do not attack the constitutionality of the pre-amendment statute. They assert, instead, that the display provision of the amendment will unreasonably restrict adult access to materials protected under the first amendment. *See American Booksellers Association, Inc. v. McAuliffe*, 533 F. Supp. 50, 56 (N.D. Ga. 1981).

The Commonwealth concedes that adults' first amendment rights cannot be limited by the restrictive obscenity standards which may be applied to juveniles. *Butler v. Michigan*, 352 U.S. 380 (1957).[7] It contends, nevertheless, that the stricter standards of the amendment's display provision can be applied so as to screen juveniles from potentially harmful material without infringing on the rights of adults to have access to the same sexually explicit material. It argues that the district court erred when it found that the statute under review does not accommodate the state's interest in protecting juveniles in the least restrictive fashion and that the amendment is facially overbroad.

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[6] The General Assembly modified the definition of materials considered harmful to juveniles to parallel the obscenity standards detailed in *Miller v. California*, 413 U.S. 15 (1973).

[7] We also question whether an older minor's first amendment rights can be limited by the standards applicable to younger juveniles. "[M]inors are entitled to a significant measure of First Amendment protection" and the government may restrict these rights "only in relatively narrow and well-defined circumstances." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). These restrictions are justified when a child is not possessed of a full capacity for individual choice, and, in assessing that capacity, the age of the minor is a significant factor. *Id.* at 214 n.11. While the pre-amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application.

A court will not find a statute facially invalid unless: (1) it cannot easily be given a narrowing construction; and (2) it has both a real and substantial deterrent effect on protected expression. *Erznoznik*, 422 U.S. at 216. The Commonwealth urges that narrowing construction were readily available to the district court. Specifically, it asserts that the prohibited materials can still be stocked by the Booksellers so long as the materials are displayed in a manner whereby juveniles cannot examine and peruse them.

The Commonwealth asserts that the amendment is a valid time, place, and manner regulation such as the zoning ordinance upheld in *Young v. America Mini Theatres, Inc.*, 427 U.S. 50 (1976). While it is true that the Supreme Court has upheld reasonable time, place, and manner restrictions, the speech so regulated either occurred in the public forum or was subject to a general zoning ordinance. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984); *Young*, 427 U.S. 50. The state's interest in regulating activities in public places is, of course, of a somewhat different character than its interest in what goes on in a private bookstore. Even under the time, place, and manner analysis, however, the amendment must fall because the governmental interest asserted in this type of regulation must not involve the content of the regulated speech. *Clark*, 468 U.S. 288. There is no question that the Virginia amendment imposes restrictions based on the content of publications.

The amendment's most serious flaw, however, is its breadth. A demonstrably overbroad regulation may act as a deterence to the exercise of constitutionally protected rights. *Erznoznik*, 422 U.S. at 216. In the instant case, the amendment's language is broad, and it does not provide any

potential defenses or methods of compliance.[8] The Commonwealth, nonetheless, asserts that compliance with the amendment would not deter the exercise of first amendment rights. It stresses that only a small percentage of the inventory in book stores could be classified as harmful to juveniles and argues that retail outlets can readily modify their display methods to comply with the amendment. Because of its recent passage, no one has yet been prosecuted under the Virginia amendment. Additionally, there was little specific evidence presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions.[9] It cannot be gainsaid, however, that book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale. *See American Booksellers Association, Inc. v. Webb*, 590 F. Supp. 677, 692-93 (N.D. Ga. 1984).

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[8] As we note, *infra*, we disagree with the rationale of some cases which hold that otherwise constitutionally offensive "display" provisions can be legitimized by specifying certain restrictive display methods as being acceptable under the statute. Technically, however, the ordinance upheld in *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983), is distinguishable from the Virginia statute which we review in that it specifically provides that material kept behind "blinder racks" was not deemed to have been "displayed." Similarly, retailers were able to comply with the ordinance in *Upper Midwest Booksellers*, 780 F.2d 1389, by placing the materials behind opaque covers, in sealed wrappers, or in "adults only" settings.

[9] The district court heard testimony from three witnesses in order to "flesh out" the pleadings and provide a more complete record. The bookstore owners testified that they felt between 30 and 50% of their inventory was covered by the display provision. The Commonwealth argues that only a "minuscule percentage" of the plaintiffs' inventory would be involved. The district court found that a significant percentage of the inventory of the average general bookstore, varying between 5 and 25%, falls within the amendment's restrictions.

The Commonwealth suggests a number of ways by which the book retailer may solve these problems, but none appears to us to significantly ease the first amendment burden created by the amendment. The display methods suggested by the Commonwealth appear either insufficient to comply with the amendment or unduly burdensome on the first amendment rights of adults, and, to this extent, we disagree with the rulings in *M. S. News* and *Upper Midwest Booksellers*. Placing "adults only" tags on books and magazines or displaying the restricted material behind blinder racks or on adults only shelves freely accessible in the main part of the store would not stop any determined juvenile from examining and perusing the materials. The statute requires that such materials not be displayed so that minors *may* have access to them. Forcing a bookseller to create a separate, monitored adults only section, requiring that the materials be sealed, or taking the materials off display and keeping them "under the counter" unreasonably interferes with the booksellers' right to sell the restricted materials and the adults' ability to buy them. Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices. Contrary to the Commonwealth's argument that the scienter requirement in the statute allows a book retailer to avoid the hazards of self censorship, each of these suggested practices would require the seller to read and make a content based judgment on each item on his shelves in order to select the ones requiring special treatment. More importantly, a retailer cannot rely on the amendment to guide him in deciding what are the least restrictive modifications in display methods which would be sufficient to satisfy the statute.

In sum, we feel that the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to withstand an overbreath challenge. We, therefore, affirm the district court's judgment declaring the challenged amendment unconstitutional and enjoining its enforcement.

III.

The Booksellers appeal the district court's denial of their application for attorneys' fees pursuant to 42 U.S.C. § 1988. The prevailing party in a § 1983 action should ordinarily recover attorneys' fees absent special circumstances which would render the award unjust. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). The district court's normally broad discretion in this area is narrowly limited both by the reasoning of *Newman* and by Congress' later explicit approval of that standard in enacting the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. *Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In denying the plaintiffs' application, the district court noted that the Booksellers could pass on the cost of litigation to their customers in the form of higher prices, that the Commonwealth acted in good faith, and that the Booksellers were the primary beneficiaries of the action striking down the statute. The court recognized that none of these factors alone would constitute the necessary special circumstance to justify denial of attorneys' fees. It held, however, that "with all these factors combined, the Court finds it more equitable to let the costs lie where they land." The district court cited no authority for the action, and we find none.

Although the Booksellers certainly benefit from the results of this litigation, the citizens of Virginia will likewise continue to enjoy unfettered freedom of expression. We do not find it unjust that the taxpayers will have to bear the costs of the award. *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979).

As to defendants Strobel and Stover, however, we feel that circumstances would make the award of attorney fees against them unjust. At the time of their involvement there was, of course, no court interpretation concerning the constitutionality of the Virginia statute. Their actions were pursuant to a duly enacted state statute, and when they were named as defendants, they did not defend the statute on its merits as did the intervening Commonwealth.

In view of the above, the district court's denial of attorney fees is reversed insofar as it related to the Commonwealth of Virginia, and is remanded to the district court with instructions to assess attorney fees against the Commonwealth. The district court's decision denying attorney fees against defendants Strobel and Stover is affirmed.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED.

FILED
OCT 9 8:56 AM '86
U.S. District Court
Fourth District

APPENDIX N

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN BOOKSELLERS
ASSOCIATION, et al.,
Appellees,

v.

NO. 85-1961
NO. 85-2284

COMMONWEALTH OF VIRGINIA, et al.,
Appellants,

and

CHARLES T. STROBEL, et al.,
Defendants.

NOTICE OF APPEAL

Comes now the Commonwealth of Virginia, by counsel, and gives notice of her appeal to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(2) of this Court's decision of June 12, 1986, in the above-styled cases. Along with No. 85-1999, these cases were consolidated for appeal by this Court. In its decision the Court found the 1985 amendment to § 18.2-391 of the Code of Virginia repugnant to the Constitution of the United States and that the district court erred in declining to award the plaintiffs below attorney's fees under 42 U.S.C. § 1988.

The mandates in all three cases were stayed by William Stover's petition for rehearing filed on June 26, 1986. Stover's petition for rehearing was denied on September 26, 1986, and this notice of appeal is timely filed in accordance with Supreme Court Rule 11.3 and the rules of this Court.

To the extent that the attorneys fee issue in No. 85-2284 may be determined to fall outside the parameters of 28 U.S.C. § 1254(2), the Commonwealth will ask the Supreme Court to consider this issue under its alternative certiorari jurisdiction. *See* 28 U.S.C. § 2103.

A copy of this notice of appeal was this date mailed to the Clerk of the Supreme Court of the United States.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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PROOF OF SERVICE

I hereby certify that on this 8th day of October, 1986, copies of this Notice of Appeal were mailed to Michael A. Bamberger, Esquire, 425 Park Avenue, New York, N.Y. 10022, counsel for American Booksellers Association *et al.* to Ara L. Tramblian, Assistant County Attorney, 1400 N. Courthouse Road, Arlington, Va. 22201, counsel for William K. Stover, and to Robert L. Murphy, Assistant City Attorney, City Hall, Alexandria, Va. 22314, counsel for Charles T. Strobel.

/s
Richard B. Smith
Assistant Attorney General

A True Copy, Teste: (Seal)
John M. Greacen, Clerk
By s Sandi Taylor
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1034

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASS'N, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASS'NS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASS'N, INC., NATIONAL ASS'N OF COLLEGE STORES, INC., BOOKS UNLIMITED, INC., and AMPERSAND BOOKS,
Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

APPELLEES' MOTION TO AFFIRM OR DISMISS

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Selected Provisions of the Code of Virginia*

§ 18.2-391. "Unlawful acts. — (a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse*:

> (1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
>
> (2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles."

§ 18.2-390(1) " 'Juvenile' means a person less than eighteen years of age."

§ 18.2-390(6) " 'Harmful to Juveniles' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles."

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* The italicized provision is the 1985 Amendment at issue in this action.

MOTION AND SUMMARY OF ARGUMENT

The district court and a unanimous panel of the Fourth Circuit have found that the 1985 amendment to Code of Virginia § 18.2-391 (the "Amendment") "discourages the exercise of first amendment rights in a real and substantial fashion" and thus is unconstitutionally overbroad. 802 F.2d at 696.

The Amendment bars any general retail bookstore or newsstand from displaying any book or magazine that could be "harmful" to a hypothetical minor of any age who *could* examine the work. The Amendment thereby restricts access of both adults and older juveniles to material which is not obscene as to them, but which may be "harmful" to the youngest juvenile.[1] The vast overbreadth of the Amendment is most starkly evinced by the Virginia Attorney General's concession before the Fourth Circuit that, under the Amendment, any general retail bookseller who displays *Hollywood Wives* by Jackie Collins, a national bestseller for over six months, on his business premises has committed a misdemeanor. The display of this and other bestselling novels is a crime under the Amendment because a hypothetical nine-year-old for whom the work is "harmful" *may* examine and peruse it.

In contrast to the two city ordinances that have been upheld in two other circuits, the Amendment is not limited to prohibiting minors from actually perusing "harmful" materials or having "harmful" materials thrust before their view. Thus no conflict among the circuits is presented.

The appellees move to dismiss the appeal and affirm the judgment below on the grounds that the rulings below are constitutionally correct and this appeal presents no substantial federal question for review.

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[1] Two of the three prongs of the definition of "harmful to juveniles" do not even require that the work be "taken as a whole." *See* Code of Virginia § 18.2-390(6).

STATEMENT OF THE CASE

On July 1, 1985, the Amendment was enacted making it unlawful "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" material deemed "harmful to juveniles." Virginia Code § 18.2-391. The district court found "the plain language of the [Amendment] . . . restricts the *display* of the proscribed materials, not simply their perusal." 617 F. Supp. at 706 (emphasis in original). The central issue determined by the district court and unanimously affirmed by the Fourth Circuit is that the Amendment is "not reasonably restricted to the evil with which it is said to deal." 617 F. Supp. at 705, quoting *Butler v. Michigan*, 352 U.S. 380 (1957).

The district court explicitly noted that Virginia's stated purpose of promoting the well-being of juveniles could more directly and more narrowly be satisfied by "a law simply forbidding the actual perusal by minors of these harmful materials." 617 F. Supp. at 707.

> "The level of discourse reaching commercial bookshelves cannot be limited to what might be appropriate for an elementary school library. The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain 'harmful' materials, the unavoidable collateral effect of the law is to severely limit the ability of adults to examine these protected materials. This, in turn, severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible."

617 F. Supp. at 705-6 (citations omitted).

Finding the Amendment's restrictions to be "far broader than necessary," the district court held the Amendment to be "facially invalid for overbreadth . . . [which] cannot be saved by any narrowing construction." 617 F. Supp. at 706-7. The Amendment was permanently enjoined from being enforced. Before both the district court and the Fourth Circuit, the Virginia Attorney General suggested that the courts could rewrite the Amendment to narrow the prohibition on display. The Attorney General thereby conceded that the Amendment as enacted is unconstitutionally overbroad. A unanimous panel of the Fourth Circuit held that "the amendment discourages the exercise of first amendment rights in a real and substantial fashion, and that it is not readily subject to a narrowing interpretation so as to withstand an overbreadth challenge." 802 F.2d at 696. The Fourth Circuit accordingly affirmed the district court's judgment declaring the Amendment unconstitutional and enjoining its enforcement.

THE APPELLEES

The appellees publish, produce, distribute and sell books, magazines, and other printed and visual materials of all types.

The American Booksellers Association, Inc. is the major national association of booksellers in the United States. It has approximately 4,000 members, which include more than 7,000 book stores. Its members account for more than 80% of all sales of books of general interest by book stores.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations.

The Council for Periodical Distributors Associations is the national trade association for over four hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,600 college and university bookstores located throughout the United States, representing over 95% of the higher education retail market for books.

Books Unlimited, Inc. is a general retail bookstore located at 2729 Wilson Boulevard, Arlington, Virginia.

Ampersand Books is a general retail bookstore located at 118 King Street, Alexandria, Virginia.

ARGUMENT

THE AMENDMENT UNCONSTITUTIONALLY RESTRICTS THE ACCESS OF ADULTS AND OLDER JUVENILES TO FIRST AMENDMENT PROTECTED MATERIALS

The jurisdictional statement is entirely premised upon the suggestion that there is no difference for purposes of First Amendment analysis between restrictions on the sale of books to minors for whom the books are "harmful," and restrictions on the display of such books to the entire general reading public. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court held that the First Amendment does not prohibit a state from regulating the *sale* to a minor of material that is found to be obscene as to that minor. The holding in *Ginsberg* is not at issue in this appeal; the Amendment prohibits the general retail *display*, to all adults and all juveniles, of any material that is "harmful" to any juvenile.

Restrictions on display have a vastly broader impact on First Amendment rights than do restrictions on sales. Prohibiting the sale of a work to a particular minor as to whom the work is obscene does not affect the First Amendment rights of anyone as to whom the work is not obscene. Prohibitions on display, on the other hand, restrict the access of all readers to any material which is obscene as to the youngest reader. The district court found, based on uncontroverted testimony, that this restriction on access "severely limits sales to adults, since the evidence establishes that adults generally become acquainted with these materials, and desire to purchase them, only if they are readily visible." 617 F. Supp. at 706. The rationale of *Ginsberg v. New York* that supported a variable test of obscenity for *sales* to minors cannot justify restrictions on *display* to minors, since such restrictions also constitute restrictions on display to adults and older juveniles of books that, as to them, are First Amendment protected. The district court specifically found that display of books is a critical factor in their sale.

> "In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and desire to purchase it only after browsing and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content."

617 F. Supp. at 702.

The Amendment criminalizes the mere display — the mere presence — of certain words or pictures. Under the Amendment, the mere availability of "harmful" words or pictures on general retail business premises is illegal, if any juvenile *could* have access to such words and pictures.

Under the Amendment, it is the "display"[2] that is the crime. It is not necessary for a juvenile actually to enter a book store before a book store owner or clerk may be arrested for violating the Amendment. It is not necessary for a juvenile actually to "examine or peruse" certain words or pictures before a book store owner or clerk may be arrested. The elements of the crime are simply that (1) one knowingly displays for commercial purpose, (2) words or pictures deemed "harmful" to any juvenile, (3) in a place where it is possible that juveniles "may" examine or peruse them.

Any work that is harmful to a juvenile of *any* age cannot be displayed in a general retail book store. The Amendment prohibits a bookseller from making the reasonable distinction as to whether a particular work may be "harmful" to a

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[2] "Display" under the Amendment is not even limited to harmful material that is thrust into the view of juveniles, but rather includes any work that is located where a juvenile "*may*" examine and peruse it, even if no "harmful" material is thrust into a juvenile's view.

nine-year-old but not "harmful" to a seventeen-year-old.[3] The Amendment thus irrebuttably presumes that whatever is "harmful" for a nine-year-old may be justifiably proscribed as to a seventeen-year-old college student.

As the Virginia Attorney General conceded before the Fourth Circuit, under the Amendment, any general retail bookseller who displays the national bestseller *Hollywood Wives* by Jackie Collins[4] on his business premises has committed a misdemeanor.

It is well-settled that a regulation affecting First Amendment rights "must be narrowly tailored to further the State's legitimate interests." *Grayned v. Rockford*, 408 U.S. 104, 116-17 (1972). *See also Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689-90 (1968). The uncontroverted trial testimony of two local Virginia booksellers and a representative of a national publisher demonstrated that the Amendment effectively prohibits the display in general retail premises of First Amendment protected materials that are not obscene as to adults and older juveniles. Since the Amendment prohibits the display of *all* works that are deemed harmful to a juvenile of *any* age, adults and older juveniles browsing in any general retail bookstore are reduced to viewing only those works that are suitable for the most susceptible young child, a result that is unconstitutional under the Court's ruling in *Butler v. Michigan*, 352 U.S. 380 (1957). State statutes similar to the Amendment have been held unconstitutional on such grounds. *See Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986); *American Booksellers Ass'n*

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[3] The Fourth Circuit noted that "[w]hile the pre-amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application." 802 F.2d at 695 n.7. This is yet another reason why variable obscenity principles are inapplicable to display restrictions.

[4] *Hollywood Wives* was on the New York Times Best Seller List for over six months beginning with the week of August 7, 1983.

v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) ("[A]n examination of the Act reveals that it infringes on the protected rights of adults. The language includes a public display prohibition which necessarily prevents perusal by, and limits sales to, adults.").

The Virginia Attorney General attempts to rely upon Eighth Circuit and Tenth Circuit opinions that were distinguished and criticized by the Fourth Circuit. Unlike the Amendment, the city ordinances at issue in *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983), and *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985), did not flatly prohibit general retail book stores from displaying all works that could be harmful to any juvenile. In *M.S. News* and *Upper Midwest*, the ordinances permitted such materials to be freely available in any general retail book store so long as no material that is "harmful to juveniles" was involuntarily thrust into the view of juveniles. While the Amendment criminalizes the mere "display" of materials without regard to whether a juvenile views such materials, the ordinances in *M.S. News* and *Upper Midwest* only prevented the harmful aspects of materials from being thrust into the view of a minor.[5]

The Amendment prohibits all "display" of materials where juveniles "may" examine and peruse them, and thereby effectively bars the "display" of all such materials to any adult as well. Permitting Virginia booksellers to display only materials suitable for a nine-year-old may insure that no juvenile will peruse "harmful" materials. The First Amendment, however, has never been interpreted to permit such a Draconian prohibition.

The Virginia Attorney General effectively concedes that *M.S. News* and *Upper Midwest* do not support the Amendment by repeatedly suggesting that the courts rewrite the Amendment

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[5] In contrast to the record in this case, *M.S. News* and *Upper Midwest* were decided without the benefit of hearing testimony regarding the actual limiting impact of display provisions on the distribution of books and periodicals.

so that it, like the ordinances at issue in *M.S. News* and *Upper Midwest*, only prohibits the thrusting of "harmful" materials into the view of minors. The Attorney General suggests that all material may be displayed so long as any "harmful" material is placed in blinder racks or adult only racks, or if "harmful" material is identified with "color-coded" tags.[6] Jurisdictional Statement at 9-10. The courts below have properly rejected these suggestions as being diametrically opposed to the plain language and clear intent of the Amendment.

> "The Attorney General suggests that a bookseller may comply with the amendment by simply placing tags on the prescribed books, or by placing them on special 'adult only' racks. The interpretation completely ignores the plain language of the new law, which restricts the *display* of the proscribed materials, not simply their perusal. If the proscribed material is on a shelf in an area where juveniles are permitted to roam, then the item is 'on display' where the juvenile 'may' examine it even if the item is tagged. Indeed, since the material may well have pictures or passages 'harmful to minors' on its front or back cover, the law is violated if a person under the age of 18 can simply see it. The amendment makes no provision for tags, adults only racks or blinder racks."

617 F. Supp. at 706 (emphasis in original).

> "Placing 'adults only' tags on books and magazines or displaying the restricted material behind blinder racks or on adults only shelves freely accessible in the main part of the store would not stop any determined juvenile from examining and perusing the materials.

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[6] It should be noted that the use of "color-coded tags" as suggested by the Attorney General would prevent neither the actual perusal of harmful materials by a juvenile nor the thrusting of harmful materials before the view of a juvenile.

> The [Amendment] requires that such materials not be displayed so that minors *may* have access to them."

802 F.2d at 696 (emphasis in original).

The Amendment as enacted effectively prohibits free access by adults and older juveniles to any work that is not appropriate for a nine-year-old. The lower courts properly concluded that this blanket prohibition on display impedes the exercise of First Amendment rights in a real and substantial fashion that is clearly overbroad. No precedent of this Court supports the blunderbuss prohibition of the Amendment.[7]

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[7] Appendix L to the Jurisdictional Statement cites a number of state statutes which appellant suggests have some relevance to this action. Two of these statutes have been held unconstitutional. *See Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (holding 8 C.R.S. §§ 18-7-502(5) and 18-7-503 unconstitutional); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986) (holding O.C.G.A. §§ 16-12-103 (e) and 16-12-104 unconstitutional). Most of the cited statutes, like the ordinances in *M.S. Casado* and *Upper Midwest*, are limited to preventing the involuntary exposure of juveniles to harmful material or preventing any person from intentionally displaying harmful materials to a specific known minor. *See* Del. Code Ann. Tit. 11, § 1365 (1979); La. Rev. Stat. Ann. § 14:91.11 (Supp. 1984); Me. Rev. Stat. Ann. Tit. 17, § 2911 (1983 & Supp. 1983-84); Mo. Ann. Stat. § 573.060 (Vernon 1979); Mont. Code Ann. § 45-8-202 (1983); Neb. Rev. Stat. § 28-808 (1979); N.J. Stat. Ann. § 2C:34-4 (West 1982); N.C. Gen. Stat. § 14-190.14 (Supp. 1985); S.C. Ann. §§ 16-15-290,-390 (Supp. 1983); S.D. Codified Laws Ann. § 22-24-29.1 (1979); Tex. Penal Code Ann. § 43.24 (1974); Vt. Stat. Ann. Tit. 13 § 2804b (Supp. 1983); W. Va. Code § 61-8A-2. The remaining cited statutes represent the diverse approaches of different states – diverse approaches that are not at issue in the instant appeal.

CONCLUSION

The Amendment broadly restricts the First Amendment rights of adults and older juveniles. The Appellant cites no authority, and the lower courts found no authority, to support the vast sweep of the Amendment's prohibition. There is no such authority. Moreover, the decision below creates no conflict among the federal courts of appeals. This appeal accordingly raises no substantial question that would warrant this Court's review, and therefore the appeal should be dismissed or the judgment below should be summarily affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1034

In The

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF GEORGIA, ARIZONA, CONNECTICUT, FLORIDA, HAWAII, INDIANA, IOWA, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, AND THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, PENNSYLVANIA, AMICI CURIAE, IN SUPPORT OF THE APPELLANT

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INTEREST OF AMICI CURIAE[1]

This case concerns the validity of laws which regulate the display or exhibition to minors of material obscene for them. A number of the states appearing *amici curiae* have in force statutes similar to the Virginia provision held to be facially unconstitutional by the Fourth Circuit in this case. *Amici* are concerned that the Fourth Circuit decision, which is in conflict with the decisions of other courts including the Eighth and Tenth Circuits, will adversely affect their own statutes. In fact, a federal district court has recently cited and relied upon the Fourth Circuit's decision in striking down the Georgia statute. *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986). Moreover, *amici* fear that affirmance by this Court of the Fourth Circuit's decision would invalidate all of their statutes.

—o—

SUMMARY OF THE ARGUMENT

Lower courts are seriously divided over the validity of minors' access or display laws. In striking down the Virginia provision, the Fourth Circuit, the decision of which is reported at 802 F.2d 691, expressly rejected the conclusions of the Eighth and Tenth Circuits. *Id.* at 695 n.8, 696. Because some 48 states have statutes which are jeopardized by this lower court conflict and the adverse Fourth Circuit decision, this case merits the Court's attention.

Minors' access laws are supported by two paramount state interests. First, the Court has recognized that states have a "'compelling'" interest in "'safeguarding the physical and psychological well-being of a minor.'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). Second, the Court has acknowledged a "substantial" governmental interest in protecting the rights of parents to supervise

[1]Because the parties to this *amici curiae* brief are states represented by their attorneys general, no consent is required to the filing of this brief. Rule 36.

the development of their children. *Bolger v. Youngs Drug Products*, 463 U.S. 60, 73 (1983). *See also Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

Obviously, the public display of material harmful to minors in a manner accessible to them engages these state interests. The Court has clearly recognized on several occasions that the states may regulate the "availability" and "exposure" to minors of material harmful or obscene for them. *E.g., Ginsberg*, 390 U.S. at 639. Minors' access laws would certainly be useless if they forbade only the sale or other transfer of harmful material to minors while allowing its unrestricted display to them.

The Fourth Circuit mistakenly concluded that the Virginia display provision is facially overbroad. Under this Court's decisions, such a provision may not be found facially invalid for overbreadth unless, *inter alia*, "its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975). Citing *Erznoznik*, the Fourth Circuit found that the Virginia provision "discourages the exercise of first amendment rights in a real and substantial fashion." 802 F.2d at 695-96. In reaching this conclusion, the Fourth Circuit expressly rejected holdings of the Eighth and Tenth Circuits. *Id.* at 695 n.8, 696.

Amici contend that the incidental and minimal effect of minors' access laws on protected adult speech is not substantial and not a basis for facial invalidation for overbreadth. As the Eighth and Tenth Circuits emphasized, such laws at most work a minor inconvenience to a limited amount of adult speech while preserving ultimate access by adults. *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288 (10th Cir. 1983). This Court has also recognized that for the sake of protecting minors minimal effects on protected adult speech are constitutionally acceptable. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding regulation of indecent radio broadcast).

One factor which led the Fourth Circuit to its conclusion that minors' access laws have a substantial deterrent effect on protected adult speech was its misunderstanding of the scienter requirements found in such laws. That court determined that compliance with the Virginia display provision "would require the seller to read and make a content based judgment on each item on his shelves." 802 F.2d at 696. This conclusion is totally at odds with the position taken by this Court that the scienter element of an obscenity offense is not met unless it is established that the defendant is aware of the "contents[,] . . . character and nature of the materials." *Hamling v. United States*, 418 U.S. 87, 123 (1974). Therefore, a bookseller who has not read a particular item or otherwise obtained knowledge of its contents cannot be convicted under a regulation like Virginia's. Indeed, display provisions place no greater burden on impacted establishments than the sale provision approved in *Ginsberg*, 390 U.S. 629.

Moreover, the minimal and incidental effect of minors' access laws on protected adult speech can be justified as a reasonable "time, place, and manner" regulation. Although such laws appear to be content-based and therefore ineligible for such treatment, their effect on adult speech is not an effort to control the content of adult discourse. Therefore, under this Court's analysis in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986), the justification of their effect on adult speech is not content-based. And the other two parts of the test for legitimate time, place, and manner regulations are clearly met: minors' access laws serve strong state interests and leave open "ample alternative channels for communication," *Virginia Board of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748, 771 (1976), by preserving ultimate adult access.

Therefore, this Court should note probable jurisdiction and reverse the decision of the Fourth Circuit.

ARGUMENT

I. INTRODUCTION

The issue presented in this case is the facial constitutionality of a Virginia statutory provision designed to protect minors from the display of materials which are harmful or obscene as to them. In the language of the statute, one may not "knowingly display [such materials] for commercial purpose in a manner whereby juveniles may examine and peruse [them]." Va. Code Ann. § 18.2-391(a) (Supp. 1986). Such laws are generally called "minors' display laws" or "minors' access laws." In this brief these terms will be used interchangeably, along with "display laws," to refer to provisions such as Virginia's. It should be noted that there are other statutes which regulate the general display of materials which are obscene as to adults under *Miller v. California*, 413 U.S. 15 (1973).[2] These statutes are not properly considered minors' display or access laws because their focus is not the protection of minors but rather the public at large.

Forty-eight American states have laws regulating in some fashion the display or exhibition to minors of harmful materials. *See* Appendix A. Many municipalities have also adopted such measures.[3] These minors' access laws vary considerably in language. A number prohibit, as does the Virginia provision, the public "display" of material which is harmful to minors[4] in a place or manner

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[2]*E.g.*, Ark. Stat. Ann. § 41-3585.5 (Supp. 1985).

[3]According to the New York Times, "Scores of cities across the country have passed [display] laws." J. Brooke, *Showing of Obscene Magazines Curbed*, New York Times 28 (November 2, 1985). Such laws or ordinances have been enacted, for example, in Minneapolis, *see Upper Midwest Booksellers*, 780 F.2d 1389, and Wichita. *See M.S. News Co.*, 721 F.2d 1281.

[4]The term "harmful to minors" has become a term of art meaning obscene for minors under the statute upheld in *Ginsberg v. New York*, 390 U.S. 629 (1968). *See infra* pp. 7-8 for a discussion of *Ginsberg* and its effect on the instant case. Note

(Continued on following page)

so as to be accessible to them.[5] Other statutes contain specific compliance directions prescribing, for example, that covered materials must be displayed above a certain height,[6] or in opaque covers,[7] or in some other manner[8] designed to limit access by minors. Thus we are concerned here not merely with the validity of an isolated statute of a single state.

Minor's access laws have met varying fates in the courts. Several courts have recently upheld such laws. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *American Booksellers Ass'n*,

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(Continued from previous page)

that the *Ginsberg* standard has been updated in some jurisdictions in light of the more recent general definition of "obscenity" propounded in *Miller v. California*, 413 U.S. 15 (1973). *See, e.g., M.S. News*, 721 F.2d at 1286-87.

[5]Ala. Code §§ 13A-12-170, -171 (Supp. 1986); Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (Supp. 1986); Colo. Rev. Stat. §§ 18-7-501, -502 (Supp. 1984) (struck down on federal and state constitutional grounds in *Tattered Cover v. Tooley*, 696 P.2d 780 (Colo. 1985)); Fla. Stat. Ann. §§ 847.0125, .013 (West 1976 & Supp. 1984); Ga. Code Ann. §§ 16-12-102, -103 (1984) (struck down in *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546); Ind. Code Ann. 35-49-3-3 (Burns 1985); Me. Rev. Stat. Ann. tit. 17, §§ 2911, 2912 (1983 & Supp. 1986) (prohibits "display" of "book, magazine or newspaper containing obscene material on its cover"); Miss. Code Ann. § 97-5-29 (Supp. 1985); Mo. Ann. Stat. §§ 573.010, .060 (Vernon 1979 & Supp. 1987); Mont. Code Ann. § 45-8-202 (1985); Nev. Rev. Stat. § 201.265 (1985) (uses term "exhibit[ ]"); N.C. Gen. Stat. § 14-190.14 (1986); N.D. Cent. Code § 12.1-27.1-03.1 (1985); 18 Pa. Cons. Stat. Ann. § 5903 (Purdon 1983); R.I. Gen. Laws § 11-31-10 (Supp. 1986); S.C. Code Ann. §§ 16-15-260, -290, -390 (Law Co-Op. 1985); Tex. Penal Code Ann. § 43.24 (1974); Utah Code Ann. §§ 76-10-1227, -1228 (Supp. 1986); Vt. Stat. Ann. tit. 13, § 2804b (Supp. 1986).

[6]Tenn. Code Ann. § 39-6-1136 (1982) (defines offense as "display" of covered materials "at a height less than five and one half (5½) feet above the floor").

[7]Fla. Stat. Ann. §§ 847.0125(2)(a) (West 1976 & Supp. 1984); Me. Rev. Stat. Ann. tit. 17, §§ 2911, 2912 (1983 & Supp. 1986); S.D. Codified Laws Ann. §§ 22-24-27, -29.1 (1979).

[8]*See* Mont. Code Ann. § 45-8-202 (1985) (requiring "display" of covered materials to be "separate[d] . . . by an opaque structure from other materials displayed").

Inc. v. Rendell, 481 A.2d 919 (Pa. Super. 1984); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). On the other hand, some courts, including the Fourth Circuit in this case, 802 F.2d 691, have recently struck down such laws. *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (resting on alternative state law grounds); *Rushia v. Ashburnham*, 582 F.Supp. 900 (D. Mass. 1983) (striking city ordinance with definitional difficulties but indicating that display provision limited to *Ginsberg* standard would be constitutional). There are also a number of older cases reaching mixed results. This conflict between lower courts cannot be resolved without guidance from this Court.

II. MINORS' ACCESS LAWS ARE SUPPORTED BY THE STATES' STRONG INTERESTS IN PROTECTING MINORS FROM ACCESS TO MATERIALS HARMFUL TO THEM AND IN PROTECTING THE RIGHTS OF PARENTS TO SUPERVISE THE DEVELOPMENT OF THEIR CHILDREN

Minors' access laws are supported by two weighty state interests. First is the compelling state interest in protecting minors from obscene materials. Second, the states have a substantial interest in protecting the rights of parents to supervise the development of their children.

This Court has repeatedly espoused the proposition that states have a strong interest in protecting the welfare of minors. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court concluded: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*.'" *Id.* at 756-57 (cit. omitted) (emphasis added). In *Ginsberg* itself, the Court acknowledged "'society's *transcendent* interest in protecting the welfare of children.'" 390 U.S. at 640 (cit. omitted) (emphasis added). The Court made it clear that this interest is "independent" from parents' interests in the care of their children. *Id.* at 639-40.

In addition to the states' compelling interest in protecting the welfare of minors, states have a substantial interest in protecting the rights of parents to supervise the development of their children. In *Ginsberg*, the Court recognized that parents' right "to direct the rearing of their children is basic in the structure of our society." 390 U.S. at 639. The Court went on to hold that the minors' access law in question there was supported by this interest:

> The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

Id. Moreover, in *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), the Court described the governmental interest in "aiding parents' efforts to discuss birth control with their children" as "*substantial.*" *Id.* at 73 (emphasis added).

In the case before the Court, the Fourth Circuit appears to have held that the display to minors of material which is obscene for them may not constitutionally be regulated. Although that court recognized that "a state government has an interest in *shielding* minors from some sexually explicit materials which are not considered obscene as to adults," 802 F.2d at 694 (emphasis added), it concluded that any attempt to regulate the display of such materials would be unconstitutional. *Id.* at 695 n.8, 696. The Fourth Circuit appears to have limited the proper scope of minors' access laws to sale or perhaps other forms of transfer. But this view unnecessarily restricts the breadth of the states' interests in this area.

In *Ginsberg*, the Court affirmed a conviction under a New York statute for the sale to a 16-year-old boy of two "'girlie'" magazines which were "harmful to minors" as defined by the statute. 390 U.S. at 631-33. This result was reached even though the magazines were "not obscene for adults." *Id.* at 634. The Court distinguished the New York statute in question there from the Michigan statute struck down in *Butler v. Michigan*, 352 U.S. 380

(1957), which forbade the distribution to adults of materials believed to have an adverse effect on minors. 390 U.S. at 634-35.

The states' interests in the protection of minors from sexually explicit material and preserving the rights of parents as recognized and upheld in *Ginsberg* extend beyond the sale to minors of objectionable materials and include the display of such material in public places. The New York statute upheld in *Ginsberg* forbade in certain circumstances the "exhibit[ion]" to minors of a sexually explicit "presentation" which was protected speech as to adults. N.Y. Penal Law § 484-h (McKinney), *quoted in Ginsberg*, 390 U.S. at 647. The Court characterized the New York statute, which it upheld, as denying minors "*access*" to harmful material, 390 U.S. at 636 (emphasis added), restricting their right "to judge and determine for themselves what sex material they may read and see," *id.* at 636-37, a regulation of "the *availability* of sex material to minors," *id.* at 639 (emphasis added), and a restraint on "minors' *exposure* to such material." *Id.* (emphasis added). *See also id.* at 641. Although the facts involved only a sale of objectionable material, the Court apparently upheld the statute on its face. *Id.* at 636-37.

Since *Ginsberg*, the Court has repeated the view that the states' legitimate interests extend beyond the sale to minors of materials obscene for them. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion), the majority summarized *Ginsberg* as holding that "[b]ookstores and motion picture theatres, for example, may be prohibited from making indecent material *available* to children." *Id.* at 749 (emphasis added). *See also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their *access* to, material objectionable as to them") (emphasis added); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975).

It is thus clear that the states' legitimate interests in protecting minors from harmful material extends to all

means of public access including display.[9] Obviously, state regulations would be useless if they forbade only the sale to minors of harmful materials but allowed other forms of dissemination such as, in the words of the Virginia statute, their "display . . . in a manner whereby juveniles may examine and peruse [them]." Va. Code Ann. §18.2-391 (Supp. 1986). Such display is certainly a means of "access," *Ginsberg*, 390 U.S. at 636, and "exposure," *id.* at 641, and therefore within the confines of the compelling and substantial state interests discussed above.

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[9]In addition to the implications in *Ginsberg*, the Court has suggested on several other occasions that display laws are valid. In *Butler*, for example, the Court commented that Michigan had another statute which was "specifically designed to protect its children against obscene matter 'tending to the corruption of the morals of youth.' " 352 U.S. at 383. This statute, which is reprinted as a footnote to the Court's opinion, prohibited, *inter alia*, the "exhibit[ion]" of certain materials in view of children on public streets or highways. The Court implied that the result in *Butler* would have been different had the defendant been convicted of violating this statute. *Id.* In *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964), the plurality, through Justice Brennan, suggested that laws prohibiting the "distribution" or "exhibition" of objectionable materials to minors would perhaps be the wiser course. The plurality cited with approval *State v. Settle*, 90 R.I. 195, 156 A.2d 921 (1959). In that case, the Rhode Island Supreme Court upheld a Rhode Island statute which, although employing a pre-*Ginsberg* definition, made it unlawful to "sell, lend, give away, show, advertise for sale, or distribute commercially" certain objectionable materials to minors. *Id.* at 923. *See also Rabe v. Washington*, 405 U.S. 313, 317 (1971) (Burger, C.J., concurring, joined by Rehnquist, J.) (commenting favorably on laws protecting children from public display.)

Several comments by the Court in *Erznoznik* are also significant for this discussion. In that case, the Court considered a constitutional challenge to a Jacksonville ordinance banning the exhibition at drive-in theaters of all motion pictures which contained any nudity if the films were visible " 'from any public street or public place.' " *Id.* at 206-07. The Court found that the ordinance unconstitutionally deterred "drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id.* at 211. In noting that no "narrowing construction" appeared likely, the Court said:

(Continued on following page)

III. THIS COURT HAS IMPOSED STRICT LIMITATIONS ON THE FACIAL INVALIDATION OF STATE STATUTES FOR OVERBREADTH

The Fourth Circuit cited, but failed properly to apply, the standards mandated by this Court for determining the facial constitutionality of state statutes. An overbroad statute is one which sweeps protected First Amendment activity into its scope. Even though, as discussed above, the states have strong interests in regulating the access by minors to materials harmful to them, a statute implementing those interests may not be sustained if it impermissibly infringes protected activity.

This Court has often made clear that the normal procedure for handling a threat by a state or federal statute to constitutionally protected activity is to invalidate the particular application—not strike the statute on its face. For example, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court reversed a conviction under the Georgia adult obscenity statute for exhibiting the movie "Carnal Knowledge" but did not invalidate the statute. *See also Brockett v. Spokane Arcades*, 105 S. Ct. 2794, 2801-02 (1985) (citing cases); *Broadrick v. Oklahoma*, 413 U.S. 601, 613-14 (1973) (citing cases).

In order to limit use of the doctrine to serious threats to First Amendment values, the Court has issued a number of restrictions. This Court has frequently warned that facial invalidation for overbreadth is "strong medicine" which should be used "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. *Amici* submit that

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> The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors. Neither appellee nor the Florida courts have suggested such limitation, perhaps because a rewriting of the ordinance would be necessary to reach that result.

Id. at 216 n.15. Thus, the Court suggested that the ordinance would have been valid had it provided, or were it susceptible to a construction, that forbade the display of materials obscene as to minors.

courts should be especially scrupulous in their observation of the limitations on facial invalidation for overbreadth when, as in the case before the Court, the challenge is made prior to enforcement. 802 F.2d at 693. In these cases, the states or other authorities have had no opportunity to eliminate by enforcement or construction any potential unconstitutional applications.

In circumscribing use of the facial overbreadth doctrine, the Court has ruled that the existence of valid applications of a statute will normally save it from facial invalidation. The Court has said: "A 'facial' challenge, in this context, means a claim that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (cit. omitted). *See also Brockett*, 105 S. Ct. at 2802-03; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, at 965 n.13 (1984). In some cases, a statute which is not "unconstitutional in every conceivable application" may nonetheless be invalid if "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). It is unquestionably correct, however, that the existence of a substantial number of valid applications will save a statute. *See Parker v. Levy*, 417 U.S. 733, 760 (1974) (describing the Court's "reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied"); *Ferber*, 458 U.S. at 773 (upholding child pornography statute "whose legitimate reach dwarfs its arguably impermissible applications"). Thus the possibility of one or several unconstitutional applications is not sufficient to invalidate a statute. *Taxpayers for Vincent*, 466 U.S. at 800 ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"). Expressing the same principle, the Court has also suggested that potential unconstitutional applications of a state statute are not a basis for invalidation so long as the sta-

tute reaches a "central core of constitutionally regulable conduct." *Ferber*, 458 U.S. at 771 n.26. *See also Broadrick*, 413 U.S. at 615-18.

The Court has imposed two basic requirements for facial overbreadth invalidation. In *Erznoznik*, the Court held: "[A] state statute should not be deemed facially invalid unless [1] it is not readily subject to a narrowing construction by the state courts, and [2] its deterrent effect on legitimate expression is both real and substantial." 422 U.S. at 216 (cits. omitted). In that case, the Court found that both prerequisites were met and, therefore, struck the ordinance. *Id.* at 217.

Under the facial overbreadth doctrine, a state statute cannot be struck unless "its deterrent effect on legitimate expression is both real and *substantial*." *Erznoznik*, 422 U.S. at 216 (emphasis added). Other cases have indicated that this requirement of substantial overbreadth applies with particular force "'where conduct and not merely speech is involved.'" *Broadrick*, 413 U.S. at 615, *quoted in Ferber*, 458 U.S. at 770. *Amici* submit that minors' display laws regulate "conduct plus speech" and that, therefore, substantial overbreadth must be shown for invalidation. *M.S. News*, 721 F.2d at 1289. The Fourth Circuit apparently agrees inasmuch as it based its invalidation of the Virginia display provision on a holding of substantial overbreadth. 802 F.2d at 696.

The substantial overbreadth requirement applies with even more weight in challenges to statutes, such as the Virginia provision in question here, governing materials entitled to less than full First Amendment protection. In *Broadrick*, the Court noted that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment." 413 U.S. at 614-15. Obscenity is, of course, beyond the shadow of the First Amendment. *Miller*, 413 U.S. at 23. Another reason for the latitude given obscenity regulations is the greater difficulty in describing obscenity offenses. *See Roth v. United States*, 354 U.S. 476, 491-92 (1957).

Another significant tenet of overbreadth analysis is that statutes should not be struck where a case-by-case analysis can obviate difficulties in application. In upholding the Oklahoma statute at issue in *Broadrick*, the Court said: "It is our view that . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may not be applied." 413 U.S. at 615-16. *See also Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 52 (1966). The Court's preference for a case-by-case approach is also expressed in one of the "cardinal rules governing the federal courts: '" . . . never to anticipate a question of constitutional law in advance of the necessity of deciding it."'" *Brockett*, 105 S. Ct. at 2801.

IV. THE FOURTH CIRCUIT ERRED IN ITS APPLICATION OF THE FACIAL OVERBREADTH DOCTRINE

A. Unlike The Fourth Circuit's Conclusion, The Virginia Display Provision Does Not Have A Substantial Deterrent Effect On Protected Adult Speech

The Fourth Circuit concluded that the Virginia display provision "discourages the exercise of first amendment rights in a real and substantial fashion." 802 F.2d at 696. It held that compliance with the provision would "unreasonably" or "unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices." *Id.* As is discussed above, a state statute may not be facially invalidated for overbreadth unless "its deterrent effect on legitimate expression is both real and substantial." *Erznoznik*, 422 U.S. at 216.

The other prong of the *Erznoznik* statement of the test requires that before a statute be invalidated it "not [be] readily subject to a narrowing construction." *Id.* That element is not seriously involved here inasmuch as the Fourth Circuit recognized three ways in which a bookseller could comply with the Virginia provision: by creating a separate adults-only section for subject materials, keeping them sealed, or taking them off display and keep-

ing them under the counter. 802 F.2d at 696. However, Virginia argued below that the display provision could be interpreted to permit other forms of compliance such as the use of blinder racks, adults only tags, or adults only shelves. *Id.* If such an interpretation is necessary to the validity of the provision, *amici* submit that the courts of Virginia should be permitted to consider it. *See Musser v. Utah*, 333 U.S. 95, 98 (1948) ("[w]hat the statutes of a state mean . . . [is a] question[] on which the highest court of the State has the final word").

In reaching its conclusion, the Fourth Circuit disagreed with the views of a number of other courts. Other courts have recognized, like the Fourth Circuit, that effective minors' access laws would cause some inconvenience to adults who seek access to materials which though harmful to minors are protected as to adults. But, unlike the Fourth Circuit, other courts have held that where ultimate access is preserved the minor inconvenience to adults which would result from display laws is not of constitutional proportion. For example, in *M.S. News*, the Tenth Circuit concluded that "the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them." *Id.* at 1288. In support of its conclusion, the court pointed out: "[A]dults may still have some access to materials not obscene as to them, and they may purchase such material." *Id.* at 1289. And in *Upper Midwest*, the Eighth Circuit held that the Minneapolis display ordinance which it sustained did not substantially interfere with adult free speech:

> We believe that the ordinance in the instant case is one that is "carefully limited," *Miller*, 413 U.S. at 24, and that does not unduly burden the First Amendment rights of adults. *See Butler*, 352 U.S. at 383; *cf. Erznoznik*, 422 U.S. at 213. Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to

> view from a merchant or to peruse the material in adults only bookstores or in segregated sections of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it. The continued availability of these materials to adults for purchase under the ordinance weighs strongly in favor of the ordinance's constitutionality.

Id. at 1395. *See also American Booksellers Ass'n v. Rendell*, 481 A.2d at 941. ("although adults may be inconvenienced in their perusal or purchase of graphic materials harmful to minors, though not obscene for adults, adult access to these materials will not significantly be impaired" and "any inhibitory effect on dissemination to adults does not render the display provision [of the Pennsylvania minors' access law] constitutionally defective, given the state's legitimate interest in shielding children from these materials"). The Fourth Circuit expressly rejected the views of the Eighth and Tenth Circuits. 802 F.2d at 695 n.8, 696.

In contrast to the views of the Fourth Circuit, this Court has recognized that for the sake of protecting minors minimal effects on protected adult speech are constitutionally acceptable. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion), for example, the Court upheld the power of the Federal Communications Commission to regulate a radio broadcast which was "indecent but not obscene." *Id.* at 729. The broadcast in question occurred in the early afternoon and was heard by the young son of the man who complained to the FCC. *Id.* at 729-30. In support of its decision, the Court relied heavily on the "ease with which children may obtain access to broadcast material." *Id.* at 750. *Amici* submit that material harmful to minors is also easily available to minors through displays in public places, which warrant the same governmental concern. The more narrow focus of minors' access laws such as the Virginia statute, which are limited to material obscene for minors unlike the looser indecency standard involved in *Pacifica*, makes minors' access laws (including display provisions) a less troublesome form of

regulation. Indeed, the Court has made clear that not a great deal more material is obscene for minors than is already obscene for adults under *Miller*. *Erznoznik*, 422 U.S. at 213-14.

Just last term the Court came back to this point. In *Bethel School District v. Fraser*, 106 S. Ct. 3159 (1986), the Court decided that a lewd and indecent speech given in a high school assembly was not protected by the First Amendment. In reaching this conclusion, the Court reaffirmed that certain limitations on adult speech may be constitutionally acceptable for the sake of protecting children: "This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Id.* at 3165, *citing Ginsberg*, 390 U.S. 629.

It is important to emphasize that display laws of the type before the Court do not suppress protected adult speech. At most they inconvenience it, while preserving ultimate access. *Amici* submit that such minimal impact is not sufficient to support facial overbreadth invalidation. Moreover, as discussed earlier in this brief, a case-by-case analysis—which is the preferred way for handling constitutional difficulties—may be used if real, as opposed to hypothetical, difficulties arise in enforcement.

B. The Fourth Circuit Was Led To Overestimate The Effect Of The Virginia Display Law On Adult Speech By Its Misinterpretation Of The Scienter Requirement

Like all obscenity laws, the Virginia minors' access statute contains a scienter requirement. It requires that a display of covered material be made "knowingly" in order for a violation to occur. Va. Code Ann. § 18.2-391(a)(1). The statute also contains a definition under which "knowingly" includes both actual and constructive knowledge. § 18.2-390(7). All obscenity laws include, either expressly or by implication, such an element.

The Fourth Circuit concluded that despite the scienter requirement persons subject to the Virginia law would be

required by the statute to review all materials in their inventories for compliance. The court held that "book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale." 802 F.2d at 696. It went on to say that compliance with the statute "would require the seller to read and make a content based judgment on each item on his shelves in order to select the ones requiring special treatment." *Id.*

But under a scienter requirement as in the Virginia statute no one may be convicted for the display of covered materials unless he is aware of the contents of the materials. Although the prosecution need not prove knowledge that the materials are obscene, this Court has consistently held that no one may be convicted of an obscenity offense unless he is aware of the "contents[,] . . . character and nature of the materials." *Hamling v. United States*, 418 U.S. at 87, 123 (1974). *See also id.* at 119-22; *Ferber*, 458 U.S. at 765; *Smith v. California*, 361 U.S. 147, 153-54 (1959) (striking ordinance without scienter element and noting that such a regulation would require " '[e]very bookseller . . . to make himself aware of every book in his shop' ") (cit. omitted). *Cf. Vachon v. New Hampshire*, 414 U.S. 478, 479 (1974) (owner of head shop could not be convicted, under a statute containing a scienter element, for sale of indecent button to 14-year-old girl when there was no evidence that "he was aware of the sale or present in the store at the time").

Under the Virginia scienter element and those of other state statutes, a store owner is not required as the Fourth Circuit mistakenly asserted to "read and make a content based judgment on each item on his shelves." 802 F.2d at 696. A store owner who fails to review his inventory and unknowingly displays to minors material obscene as to them cannot be convicted.

Display provisions of minors' access laws do not place any greater burden on a business establishment than a provision, as was approved in *Ginsberg*, prohibiting the

sale to minors of harmful materials. Under a sale provision, a shopowner would have the same concern as under a display provision over whether each item in his inventory is harmful to minors. Call the burden to a subject establishment under a sale provision X; it would still be X under a display provision. It would not be $3X$ or $X+Y$, as the Fourth Circuit supposed.

Thus, the impact of display laws is significantly cushioned by their scienter requirements. The Fourth Circuit's erroneous view confuses the law in this area and calls into question the validity of all obscenity laws inasmuch as all depend upon proof of scienter. This error should be corrected by this Court.

V. THE FOURTH CIRCUIT ERRED IN HOLDING THAT THE VIRGINIA DISPLAY PROVISION CANNOT BE SUSTAINED AS A TIME, PLACE, AND MANNER REGULATION

The effect of the Virginia display provision on adult speech may also be upheld as a legitimate "time, place, and manner" regulation. This theory recommends itself because, as discussed above, display laws have an incidental effect on protected adult speech. But this effect is not suppressive: no attempt is made to prohibit adults from engaging in speech which is obscene for minors. Only the time, place, or manner of such adult speech is affected. On the other hand, display laws obviously are intended to suppress the dissemination to minors of speech materials which are obscene as to them. This purpose is, under *Ginsberg*, appropriate and constitutional. Thus, the effect on speech to minors does not need justification under the time, place, and manner rationale.

The Fourth Circuit rejected this rationale because "the Virginia amendment imposes restrictions based on the content of publications." 802 F. 2d at 695. In reaching this conclusion, the Fourth Circuit rejected the holdings of the Eighth and Tenth Circuits. *See Upper Midwest Booksellers*, 780 F.2d at 1396 (upholding display ordinance as reasonable time, place, and manner regulation although

concluding it to be content-based); *M.S. News*, 721 F.2d at 1288-89 (same).

This Court has prescribed a three-part test for identifying legitimate time, place, and manner regulations. The Court has stated the test as follows:

> We have often approved restrictions of that kind provided [1] that they are justified without reference to the content of the regulated speech, [2] that they serve a significant governmental interest, and [3] that in so doing they leave open ample alternative channels for communication of the information.

Virginia Board of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

Properly understood, the Virginia display provision satisfies the first part of the test because it is not content-based in its effect on adult speech. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (plurality opinion), and *City of Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986), the Court approved zoning ordinances which regulated the location of certain adult entertainment establishments. Although affected establishments were identified by the content of their speech, the Court held that the ordinances were not prohibited content-based regulations because they were an effort to control the "undesirable secondary effects of such businesses" and not aimed at the "suppression of free expression." *Playtime Theatres*, 106 S. Ct. at 929-30. *See also American Mini Theatres*, 427 U.S. at 70-72 (plurality opinion); *id.* at 82 n.6 (Powell, J., concurring). In these cases, the Court recognized that a regulation is not content-based if the true object of the regulation is an unrelated and legitimate governmental interest. A superficial analysis would lead one to conclude that the Virginia provision is content-based inasmuch as it applies only to speech which is obscene for minors—an obvious matter of content. However, as discussed above, the object of the provision is the permissible purpose of regulating the dissemination to minors of speech which is obscene for them. It is not intended to regulate the dissemination of such speech to adults. The justification of the effect of the

provision on adult speech is the protection of minors—an object unrelated to the content of adult speech. It is therefore "justified [in its effect on adult speech] without reference to the content" of adult speech. *Virginia Board of Pharmacy*, 425 U.S. at 771.

The Virginia provision clearly satisfies the other two parts of the test for legitimate time, place, and manner regulations. As previously discussed, minors' access laws serve two strong state interests. And display laws obviously leave open "ample alternative channels for communication" between adults. *Id.* Compliance with the Virginia law would not affect ultimate adult access to materials obscene for minors.

Thus, the effect on adult speech should be regarded as a legitimate time, place, and manner regulation. This unintended and minimal effect is at most a small and acceptable shift in the time, place, and manner of adult speech. It bears emphasis that the Virginia display provision is a more constitutionally acceptable form of regulation than the ordinances involved in *Playtime Theatres* and *American Mini Theatres* because the universe of speech affected by the Virginia law is smaller in that it is limited to a form of obscenity.

CONCLUSION

For the above-stated reasons, the Court should note probable jurisdiction and reverse the judgment of the Fourth Circuit.

Respectfully Submitted,

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APPENDIX

The following state statutes regulate the display or exhibition of materials harmful or obscene for minors:[1]

Ala. Code §§ 13A-12-170, -171 (Supp. 1986) (prohibits "display for sale")

Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (1978) (prohibits "present[ing], . . . mak[ing] available. . . . [or] show[ing] . . . to minors" or "public display")

Ark. Stat. Ann. §§ 41-3581, -3582, -3583 (1977)[2] (prohibits certain "exhibit[ions]" to minors)

Cal. Penal Code § 313, 313.1 (West Supp. 1986) (prohibits "exhibit[ion]" to minors and regulates certain vending machine "display[s]" near schools and "public playground[s]")

Colo. Rev. Stat. §§ 18-7-501, -502 (Supp. 1984)[3] (prohibits "exhibit[ion], expos[ition], or display")

Conn. Gen. Stat. Ann. §§ 53a-193, -196 (West 1985) (prohibits "present[ation or] exhibit[ion]" to minors)

Del. Code Ann. tit. 11, §§ 1361, 1365 (1979 & Supp. 1984) (prohibits allowing "a person under the

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[1]Some statutes forbid the display or exhibition in places open to or frequented by minors. Others prohibit only the display or exhibition to minors. The latter class of statutes appears to require as an element of the offense that a display or exhibition to a minor has actually occurred.

[2]Illustrating a different type of display law, a separate Arkansas statutory provision prohibits certain general displays of material obscene as to adults. Ark. Stat. Ann. § 41-3585.5 (Supp. 1985). Because the purpose of such regulations is the protection of the public at large, they are not true examples of minors' display laws.

[3]Struck down on federal and state constitutional grounds in *Tattered Cover v. Tooley*, 696 P.2d 780 (Colo. 1985).

age of 12'' on premises where material is ''readily accessible to or easily viewed by such minors'')

Fla. Stat. Ann. §§ 847.0125, .013 (West 1976 & Supp. 1984 (prohibits certain ''exhibit[ions]'' and ''display[s]'')

Ga. Code Ann. §§ 16-12-102, -103 (1984)[4] (prohibits ''exhibit[ion], expos[ition], or display'')

Hawaii Rev. Stat. §§ 712-1210, -1215 (1976 & Supp. 1983) (prohibits ''exhibit[ion or] present[ation]'' to minors)

Idaho Code §§ 18-1513, -1514, -1515 (1979) (prohibits ''present[ation or] exhibit[ion]'' to minors)

Ill. Rev. Stat. ch. 38, § 11-21 (1979) (prohibits ''exhibit[ion]'' to minors)

Ind. Code Ann. § 35-49-3-3 (Burns 1985) (prohibits ''displays'')

Iowa Code Ann. §§ 728.1, .2, .3 (West 1979 & Supp. 1986) (prohibits ''exhibit[ion] . . . to a minor'' or ''exhibit[ion] . . . so that it can be observed by a minor'')

Kan. Stat. Ann. §§ 21-4301, -4301a (1982) (prohibits ''present[ation or] exhibit[ion]'' to a minor of material obscene as to adults)

Ky. Rev. Stat. Ann. §§ 531.010, .020, .030 (Michie/Bobbs-Merrill 1985) (prohibits ''exhibit[ion]'' to minors of material obscene as to adults)

La. Rev. Stat. Ann. §§ 14:91.11 (West 1986) (prohibits ''exhibition or display'' to minors)

Me. Rev. Stat. Ann. tit. 17, §§ 2911, 2912, 2913 (1983 & Supp. 1986) (prohibits ''display'' of ''book,

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[4]Struck down on federal constitutional grounds in *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986).

magazine or newspaper containing obscene material on its cover" and prohibits "exhibit[ion]" of "obscene motion pictures")

Md. Ann. Code art. 27, §§ 416B, 416C, 416E, 419 (1982 & Supp. 1986) (prohibits "display")

Mass. Gen. Laws Ann. ch. 272, §§ 28, 29, 31 (West Supp. 1986) (prohibits "exhibit[ion] or display" to minors)

Mich. Comp. Laws Ann. §§ 722.671 to .677 (Supp. 1986) (prohibits "exhibit[ion], or show[ing]" to minors)

Minn. Stat. Ann. §§ 617.292, .294 (West Supp. 1987) (prohibits certain "exhibit[ions]" to minors)

Miss. Code Ann. §§ 97-5-27, -29 (Supp. 1985) (prohibits "exhibit[ion]" to minors or "display[s]")

Mo. Ann. Stat. §§ 573.010, .060 (Vernon 1979 & Supp. 1987) (prohibits "displays")

Mont. Code Ann. §§ 45-8-201, -202 (1985) (prohibits "display")

Neb. Rev. Stat. §§ 28-807, -808, -809 (1985) (prohibits "display for sale . . . to a minor")

Nev. Rev. Stat. §§ 201.256 to .265 (1985) (prohibits "exhibit[ion] for sale . . . to a minor, or exhibit[ion] for sale to an adult in such a manner or location as to allow a minor to view or have access")

N.H. Rev. Stat. Ann. §§ 571-B:1, -B:2 (1986) (prohibits "provid[ing]" or certain "exhibit[ions]" to minors)

N.J. Stat. Ann. § 2C:34-3 (West 1982) (prohibits admission of minors to "exhibit[ion of] an obscene film"; definition of "obscene" not adjusted for minors)

N.M. Stat. Ann. §§ 30-37-1, -2, -3 (1980) (prohibits "display for sale . . . to a minor")

N.Y. Penal Law §§ 235.20, .21;[5] 245.11[6] (McKinney 1980) (prohibits certain "exhibit[ions]" and "display[s]")

N.C. Gen. Stat. § 14-190.13, .14, .15 (1986) (prohibits "display[]")

N.D. Cent. Code § 12.1-27.1-03.1 (Supp. 1985) (prohibits "display[]")

Ohio Rev. Code Ann. § 2907.31 (Anderson 1982)[7] (prohibits "furnish[ing or] present[ing]" to minors)

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[5]This New York exhibition provision, like several other state statutes, seems to be aimed primarily at movies and live performances. The provision covers "a motion picture, show or other presentation." § 235.21(2).

[6]This section regulates the "public display of offensive sexual materials" in places visible from certain specified areas. § 245.11. Although materials covered by the section exceed those which are obscene for adults, *People v. Oshry*, 502 N.Y.S. 2d 590, 592 (J.Ct. 1986), they are not coterminus with materials obscene for minors. *Id.* at 594. Nevertheless, the section is intended, according to the declaration of legislative intent, to protect minors as well as unconsenting adults. 1971 N.Y. Laws § 1, c. 962; 1985 N.Y. Laws § 1, c. 231. *See also Oshry*, 502 N.Y.S.2d at 592-94. This New York provision is, therefore, not strictly a minors' display law. However, if it is valid, it appears that minors' display laws employing a "harmful for minors" standard are valid *a fortiori* inasmuch as the latter are arguably more narrow in scope.

[7]The Ohio statute does not use the word "display" or "exhibit." It is, therefore, unclear whether a typical display of covered materials could be a violation. Illustrating the flexibility of the language found in some minors' access laws, the committee comments to the section state, however, "This section is designed to prevent persons from *exposing* the young to obscenity . . . unsuitable for juveniles." § 2907.31 (Committee Comment to H 511).

Or. Rev. Stat. §§ 167.075, .080 (1985)[8] (prohibits admission of minor to premises where covered materials are "displayed")

18 Pa. Cons. Stat. Ann. § 5903 (Purdon 1983) (prohibits "display")

R.I. Gen. Laws § 11-31-10 (Supp. 1986) (prohibits "display")

S.C. Code Ann. §§ 16-15-260, -290, -390 (Law Co-Op. 1985) (prohibits "display[]")

S.D. Codified Laws Ann. §§ 22-24-27, -29.1, -30 (1979) (prohibits certain "display[s]")

Tenn. Code Ann. § 39-6-1136 (1982) (prohibits certain "display[s]")

Tex. Penal Code Ann. § 43.24 (1974) (prohibits "display[]")

Utah Code Ann. §§ 76-10-1201, -1206, -1227, -1228 (1978 & Supp. 1986) (prohibits "exhibit[ion]" or "show[ing]" to minors; and "display")

Va. Code Ann. § 18.2-391 (Supp. 1986) (prohibits "display")

Vt. Stat. Ann. tit. 13, § 2804b (Supp. 1986) (prohibits "display[]")

Wash. Rev. Code Ann. §§ 9.68.050, 060 (1977) (provides civil and criminal procedure for regulating "exhibit[ion]" to minors)

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[8]The Oregon statute, like those of a number of states, does not limit its application to material obscene for minors under the statute approved in *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified in light of *Miller v. California*, 413 U.S. 15 (1973). The constitutionality of such statutes is therefore problematic. In *State v. Frink*, 60 Or. App. 209, 653 P.2d 553 (1982), the Oregon Court of Appeals held that the Oregon definition is unconstitutional. *See also American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (striking previous Georgia statute which failed to follow the *Ginsberg* formula).

W. Va. Code §§ 61-8A-1, -2 (1984) (prohibits "display" to minors of material obscene as to adults)

Wis. Stat. Ann. § 944.25 (West 1982 & Supp. 1986) (provides civil procedure for regulating "exhibit[ion]" to minors)

Wyo. Stat. §§ 6-4-301, -302 (1983) (prohibits "exhibit[ion]" to minors of material obscene as to adults)

Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

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Case No. 86-1034

In the

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

vs.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,

Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF CITY OF MINNEAPOLIS, AMICUS CURIAE, SUPPORTING JURISDICTIONAL STATEMENT OF APPELLANT, COMMONWEALTH OF VIRGINIA

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QUESTION PRESENTED

Is the 1985 Amendment to §18.2-391 of the Code of Virginia, making it illegal to knowingly display sexually explicit material that is obscene as to children in a manner that allows children to examine and peruse such obscene material, unconstitutional on its face?

PARTIES BELOW

The appellants in the court of appeals were the Commonwealth of Virginia, by her Attorney General, and William K. Stover, Chief of Police for Arlington County, Virginia. The appellees were the American Booksellers Association, Inc., the Association of American Publishers, the Council for Periodical Distributors Association, Inc., the National Association of College Stores, Inc., Books Unlimited, Inc., of Arlington, Virginia, and Ampersand Books of Alexandria, Virginia.

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BRIEF OF CITY OF MINNEAPOLIS, AMICUS CURIAE, SUPPORTING JURISDICTIONAL STATEMENT OF APPELLANT, COMMONWEALTH OF VIRGINIA

OPINIONS BELOW

The City of Minneapolis calls to this Court's attention the decisions reported concerning the Minneapolis Ordinance where those decisions concern the **Constitutional** issues presented identically by the Virginia statute. Those decisions are reported at 602 F.Supp. 1361 and 780 F.2d. 1389.

JURISDICTION

In addition to the jurisdiction explicitly invoked by the Commonwealth of Virginia, Amicus would urge this Court to consider the direct conflict between the decisions of the 10th and 8th Circuits on one hand, and that of the 4th Circuit on the other, presented on Constitutional issues requiring clear and uniform application.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amicus adopts the statement of Appellant.

STATEMENT OF THE CASE

Amicus adopts the statement of Appellant.

THE INTEREST OF THE AMICUS CURIAE

In June 1984, the City Council of the City of Minneapolis responded to the clear invitation of this Court set out in **Miller v. California**, 413 U.S. 15, 18-19, (1973) to

regulate the commercial display of obscene materials:

> This Court has recognized that the States have a legitimate interest in prohibiting dissemination or **exhibition** of obscene material when the **mode** of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of **exposure to juveniles.** (Emphasis supplied and 13 citations omitted).

This Court reiterated this invitation and the basis therefor in **Paris Adult Theatre I v. Slaton**, 413 U.S. 49, 57 (1973) in authorizing States to **ban** obscenity, even as to "consenting adults":

> Although we have often pointedly recognized the high importance of the state interest in regulating the **exposure of obscene materials to juveniles** and unconsenting adults, (citations omitted),this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material.
>
> ....

> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, **even assuming it is feasible to enforce effective safeguards against exposure to juveniles** and to passersby.[7] (emphasis added).

What is important is that regulation of juvenile access to, exposure to, or the availability of obscene material to them has been a forgone conclusion of the Court for more than 30 years. That sort of regulation was clearly seen as **less intrusive to or suppressive of First Amendment rights** than the efforts to ban or to eliminate the material itself that the Court was in the process of approving.

Given this Court's decision in **Ginsberg v. New York**, 390 U.S. 629 (1968), defining such obscene material as to juveniles and authorizing a ban of access by them to such material in the commercial context of sale, the City Council, after hearing from a Task

Force that was constituted to investigate the effects of "pornography" on the community in view of the debate surrounding the "civil rights approach to pornography", ("'pornography' as 'sex discrimination'"), determined that the harm of juvenile exposure could be effectively dealt with **only** if regulation of commercial exposure prior to sale, or in lieu of sale, were enacted to support the commercial sales restriction: "regulation of sales without control over commercial displays of materials deemed harmful to minors would render protective efforts meaningless." **American Booksellers Association, Inc., v. Rendell**, 481 A.2d 919, 942 (Pa. Super. 1984).

Minneapolis enacted its regulation, and the Ordinance was vigorously challenged immediately upon its effective date, but **before** any experience could be gained concerning its enforcement. The District

Court and the Eighth Circuit Court of Appeals were both told by the booksellers that the Ordinance was unduly burdensome and expensive to the booksellers, overbroad in its scope, invalid as "time, place, and manner" regulation, and suppressive of adult rights. In extensive, analytical, and well-reasoned opinions, both Courts rejected these speculative attacks upon the Constitutionality of the Ordinance, the District Court calling the attack based upon alleged infringement of adult access ala **Butler v. Michigan**, 352 U.S. 380 (1957) "clearly overstate[d] somewhat", **Upper Midwest Bookseller's v. City of Minneapolis**, 602 F.Supp. 1361, 1370 (D. Minn. 1985), and the Eighth Circuit Court of Appeals recognizing that the Ordinance fell into the interstices of current First Amendment doctrine, regulating the display of material protected as to adults and unprotected as to

minors. The whole issue became one of whether the Ordinance allowed sufficient adult access while prohibiting such access to minors. The Eighth Circuit concluded that display **restrictions** as to minors which **allowed display as to adults** and ultimate adult access were not unconstitutional, squarely rejecting the **Butler** attack in the same way this Court rejected a similar attack on sales restrictions in **Ginsberg**, supra, 390 U.S. at 634-635. **Upper Midwest Booksellers Association v. City of Minneapolis**, 780 F.2d. 1389 (8th Cir. 1985).

Despite the advance, conjectural claims of the seven-member Upper Midwest Booksellers Association as to the dire effects of the Ordinance upon merchants and customers, the experience of the City of Minneapolis in the nearly two years that the Ordinance has been in force (the District Court TRO was lifted February 25, 1985), has been precisely the

opposite. As the District Court predicted, and the Circuit Court confirmed, enactment and enforcement of the Ordinance did not usher in a era of repression of creativity or suppression of ideas.

There have been **no criminal prosecutions** under the Ordinance, as none have been necessary: compliance has been 100% and accomplished quickly and easily. Most merchants did not have to alter their marketing practices in any significant way, some not at all; and many reported improved relationships with and complimentary comments from their customers who had had concerns about minors' access to material short of "sale". The "sealed wrapper" concept has reportedly aided the marketing of materials by preventing such materials from becoming "shopworn" and has been voluntarily extended to materials **not** regulated by the Ordinance, those materials in "adults only" areas, and,

most interestingly, to materials in "adults only bookstores", with an "inspection copy" being made available for browsing, where the merchant desires it. The proprietor of a store that had an "adults only" area prior to the ordinance has noted that the "sealed wrapper" increases interest in the materials by allowing the purchaser to speculate that the contents contain something other than the expected, whereas allowing the prospective purchaser to satisfy his curiosity results in knowledge that there is "nothing new". In any case, the material has remained available for display, marketing, and purchase, impulse or otherwise. **No local merchant has reported or complained of loss of sales or profits due to the Ordinance.**

At first, there was a flurry of isolated, "protest overcompliance" with combination opaque-and-sealed wrappers, supplied by the wholesaler to the merchant

upon request, appearing on material that required neither "sealing" nor "blocking from view" of minors. That activity soon died out as the merchants accepted the fact that the Ordinance focused **only** upon that material which they **already could not "sell" to minors under the similar, existing state regulation.**

Compliance with the Ordinance is so familiar, because of the State's **Ginsberg-type** statute, so easily accomplished and unobtrusive, and such a practical way to achieve the commonly accepted goals of the Ordinance, that it has become a way for the merchants to demonstrate their sensitivity and concern over the issue of sexually explicit material to both parents and community. The practices **required** in Minneapolis (pop. 370,000) have spread throughout the greater metropolitan area (pop. 2,000,000+) on a **voluntary** basis by the merchants themselves, especially the "chain"

stores and video merchants. These merchants have apparently found economic **benefit** to themselves in these practices in order to engage in what the challengers of the Ordinance so hysterically and loudly condemned. The merchants are offering that "supervision of children's reading" (See **Ginsberg**, supra, 390 U.S. at 640) that parents and the community want, as members of the community, not adversaries to it. Even the Minneapolis Star and Tribune, a practitioner of the fullest extent, and staunch supporter and defender, of First Amendment freedoms, found the Ordinance logical, sensible, and effective. See Appendix.

It was, therefore, with great dismay that the City of Minneapolis, saw the Fourth Circuit Court of Appeals not only succumb to the hysterical speculations of the challengers of the Virginia statute when

concrete experience was available in Minneapolis, **City of Renton v. Playtime Theatres, Inc.**, ___ U.S. ____, 106 S.Ct. 925 (1986), but also attack the logical and legal foundation of the whole concept of "obscenity", display and other regulation of obscenity, and the validity of the Eighth Circuit Court decision and those decisions of this Court upon which it is based. If the Fourth Circuit's reasoning concerning regulation of display in general is adopted or upheld in this Court, then there will be no display regulation possible. The Fourth Circuit decision in this matter is grounded upon the premise that material, protected in any context, is protected absolutely in all contexts: it "throws the baby out with the bath water."

The City of Minneapolis, Minnesota, a political subdivision, submits this brief pursuant to Supreme Court Rule 36.1 and 36.4.

STATEMENT OF REASONS WHY THE QUESTION PRESENTED IS SUBSTANTIAL

Through its decision in this matter, the Fourth Circuit Court of Appeals has hopelessly confused the analysis of the area of "display regulation" law that is developing across the country, thwarted the reasoning and balance of doctrines enunciated by this Court, and engaged in sophistry. Whether consciously or not, the Fourth Circuit has questioned the very validity of this Court's fundamental rulings on "obscenity." This Court must address the area, clarify the analysis by eliminating the confusion, and provide the Constitutional guidance that the entire country needs and desires in this area, where so much activity is occurring.

The Fourth Circuit Court had two main enunciated concerns about the Virginia Amendment: first, that it was "content-

based"; second, that it was "overbroad". These articulated concerns were mixed and matched, and confused with other, unarticulated concerns.

I.

Regarding the restrictions as being "content-based", it should be noted that the display regulations are just as content-based as the sales regulation that preceded them in time, nationwide application, and approval of this Court. "Obscenity" itself is a content-based concept. Calling these display regulations Constitutionally invalid is tantamount to calling this Court's handling of "obscenity" in general, and "variable obscenity" in particular (See **Mishkin v. New York**, 383 U.S. 502 (1966) and **Ginsberg**, supra), invalid as content-based. The definitional approach created and fostered by this Court concerning obscenity **is** based upon a review of the content of a work. There is

no escaping that reality. But merely labelling a regulation as content-based misconceives the issue.

The issue is whether expression is either **protected** or **unprotected.** "Obscenity" is unprotected expression. **Miller v. California**, supra; **Paris Adult Theatre I v. Slaton**, supra; **Kois v. Wisconsin**, 408 U.S. 229 (1972); **Ginsberg v. New York**, supra. The reasoning for this lack of protection has been succinctly stated by this Court:

> The protection given speech and press was fashioned to assure unfettered interchange of **ideas** for the bringing about of political and social changes desired by the people. (Emphasis in original).

Miller, 413 U.S. at 35-36. Although all **ideas** having the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the First Amendment guaranties,

> ...there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. **These include the lewd and the obscene.... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality....**

Miller, supra, 413 U.S. at 20-21, citing **Roth v. United States**, 354 U.S. 476 (1957) (emphasis supplied by the **Roth** Court), citing **Chaplinsky v. New Hampshire**, 315 U.S. 568, 571-572. The key feature of "obscenity", then, is that it is not "speech"; it does not express "ideas"; it has no "content"; its regulation does not involve censorship of ideas -- good or bad, sound or unsound -- and repression of political liberty. See **Miller**, supra, 413 U.S. at 36-37. The distinction between protected and unprotected expression

is based on the content of the work taken as a whole and upon judgments being made concerning its "prurient appeal", "patently offensive manner", and "lack of serious value". These judgments cannot be made unless and until the content of a work is reviewed.

In order for a regulation to be suspect as content-based, that regulation must apply to "speech", to protected expression; and it must be aimed **directly** at that expression, **because** of its content: the analysis smacks of equal protection analysis and turns on "whether there is an appropriate governmental interest suitably furthered by the differential treatment." **Police Dept. of Chicago v. Mosely**, 408 U.S. 92, 95 (1972). See also **Heffron v. International Society for Krishna Consciousness, Inc.**, 425 U.S. 640 (1981); **Erznoznik v. City of Jacksonville**, 422 U.S. 205 (1975). Because the Virginia

statute is concerned with materials that are not "speech", are not protected as to minors, that **are obscene** as to minors, "content-based" analysis does not apply; as the rational basis for the differential treatment in furtherance of an appropriate governmental interest is present, by definition: the material "obscene"; it is material that is harmful to minors; the material is only partially protected. The Fourth Circuit Court did not address this aspect of the case before it, nor the importance of context (See **Kois**, supra) in determining the amount and nature of protection to which material may be entitled.

Because this same material is presumably protected as to adults, display regulation is arguably in the interstices of current First Amendment doctrine. This Court has allowed "time, place, and manner" regulation of protected speech, where there was a valid

governmental interest unrelated to the speech being narrowly and directly pursued, such that any impact upon protected speech was incidental, insubstantial, and no greater than that necessary to pursue the valid governmental purpose. **Young v. American Mini Theatres, Inc.**, 427 U.S. 50 (1976) ("adult" movies); **Lehman v. City of Shaker Heights**, 418 U.S. 298 (1974) ("political" versus "product" advertising on public busses); **Grayned v. City of Rockford**, 408 U.S. 104 (1972) (noise near schools); **Cox v. Louisiana**, 379 U.S. 559 (1965) (demonstrations in or near courthouse). **Young** and **Lehman** involved content-based distinctions. Mr. Justice Stevens, writing for the plurality in **Young**, supra, expressly contemplated the regulation of the manner of display of material harmful to minors, based upon content, and even though protected as to adults:

> More directly on point are opinions dealing with the question whether the First Amendment prohibits the State from wholly suppressing sexually oriented materials on the basis of their "obscene character." In **Ginsberg v. New York**, (citation omitted), the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults.[33] Surely the First Amendment does not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

This Court's decision and analysis in **Ginsberg** is controlling in this case and in the whole area of regulation of material obscene as to children but protected as to adults. See **Upper Midwest Booksellers**, supra, 780 F.2d. at 1395. The Fourth Circuit

Court did not address the solution offered by **Ginsberg** and this Court, because that Circuit Court refused to grant to the State the interest and authority to address obscene material in a proper context, simply because the material may be protected in another context.

II.

The Fourth Circuit's second and major concern was the alleged "overbreadth" of the statute. The Court never really explained just in what way the Amendment was "overbroad." Its conclusion of law was the starting point for its "analysis," and it seems reasonably clear that the Court of Appeals was confused as to the doctrine it was purportedly applying.

In **Thornhill v. Alabama**, 310 U.S. 88, 97 (1940) this Court defined the concept of "overbreadth" with the following definition: "not aim[ing] specifically at evils within

the allowable area of state control but...sweep[ing] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." By using the definition of obscenity as to minors approved by this Court in **Ginsberg**, the Commonwealth of Virginia should have been assured that its statute would not be definitionally overbroad, as it was focused upon material unprotected by the First Amendment in the context presented. The Fourth Circuit implicitly overruled this Court's decision in **Ginsberg** by calling the Commonwealth's statute overbroad, as it could be overbroad only if this Court's concept of variable obscenity is overbroad, simply because the concept impacts indirectly and incidentally upon material protected in other contexts. The only question that should have remained was whether this regulation achieved a **suppression** of material protected as to

adults as was the case in **Butler v. Michigan**, supra, by not staying focused upon and "reasonably restricted to the evil with which it is said to deal." **Butler v. Michigan**, supra, 352 U.S. at 383. The Fourth Circuit Court of Appeals simply did not address the correct question; it also did not directly address its challenge to this Court's rulings on "obscenity". It assumed that because the material under consideration was partially protected in a proper context, the protections (to paraphrase **Butler**) need not be reasonably restricted to those areas and contexts with which those protections are said to deal.

This Court has already addressed the kind of adult access that must be made available in the context of regulation of material harmful to minors and as against a **Butler** challenge:

> [The statute] does not bar ... stocking the magazines and selling them to persons 17 years of age or older, and therefore ... is not invalid under our decision in **Butler**....

Ginsberg, 390 U.S. at 634-635. (emphasis added). In the same way, the Virginia statute does not bar the stocking, merchandising, and selling of the materials. The statute leaves it to the choice of the individual merchant as to which of several methods to employ in complying with the statute (preventing juvenile perusal and examination) consistent with effective merchandising practice. The Minneapolis ordinance operates similarly, setting a standard ("sealed wrapper"; "blocked from view") and leaving the merchant to choose which of the many and varied methods of compliance best suit the functionality required by the ordinance. **Viewed as an entity**, the market for this sexually explicit material is essentially unrestrained. **Young**,

supra, 427 U.S. at 62. This is the ultimate access of **Ginsberg**.

Where no message is silenced, censored, or suppressed, where no person is limited in their ultimate ability to gain access to the material, and where the message or content can still reach its intended audience, although maybe not as conveniently as before in **every** individual instance, (see **Young**, supra, 427 U.S. at 79, note 3), then freedom of expression is not curtailed. All that is required is for reasonable alternative avenues of communication to exist. **City of Renton**, supra, ___ U.S. ___; 106 S.Ct. 925 (1986). Not only are the claims of economic catastrophe to booksellers arising out of the implementation of a regulation such as this irrelevant to the First Amendment issues that are possibly raised, but also they are untrue.

> The inquiry for First Amendment purposes is not concerned with economic impact; rather it looks only to the effect of this ordinance upon freedom of expression. This prompts essentially two inquiries: (i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and (ii) does it restrict in any significant way the viewing of these movies by those who desire to see them?

Young v. American Mini Theatres, Inc., supra, 427 U.S. at 78-79, concurrence of Justice Powell.

III.

Finally we reach the sophistry utilized by the Court of Appeals to reach the result that it did. In its decision, the Court of Appeals declared:

> In the instant case, the amendment's language is broad, and it does not provide any potential defenses or methods of compliance.[8]

It sounds as if the Court was receptive to the idea of display regulation, if specific

methods were specified, rather than a performance standard; but as soon as one refers to footnote 8, one realizes that he was mislead by the Court:

> [8]As we note, infra, we disagree with the rationale of some cases which hold that otherwise constitutionally offensive "display" provisions can be legitimized by specifying certain restrictive display methods as being acceptable under the statute.

That Court then goes on to criticize the carefully reasoned rulings in **M.S. NEWS v. Casado**, 721 F.2d 1281 (10th Cir. 1983) and in **Upper Midwest Booksellers Association v. City of Minneapolis**, 780 F.2d 1389 (8th Cir. 1985) as allowing either insufficient compliance methods with the regulations or for approving restrictions unduly burdensome on adult First Amendment rights.

Can this be? First the Court recognizes the legitimate interest of the State in regulating juvenile access to obscene

material. Then it criticizes the effort for doing something about it in a minimally intrusive manner as to adult access, because the Statute doesn't **specify methods of compliance with which the Court can disagree, if it had.** Was that Court really concerned about some concept of lack of fair notice, instead of overbreadth? To paraphrase that Court's reasoning: the statute is invalid because of the failure of the legislature to require overly burdensome methods of compliance; and if the legislature had supplied those methods of compliance approved in other jurisdictions, the statute would also be invalid. Apparently there is no way that the Fourth Circuit will allow regulation of the manner of display of obscene material. That Court offers no illumination as to what kind, or within what parameters, if any, specified methods of compliance would be approved. That Court also offers no

explanation or reasoning as to how this Court's approved definition of material harmful to minors and accommodation of adult access (see **Ginsberg**, supra.) overreaches its intended object so as to **suppress** adult access to the material.

CONCLUSION

Communities across the country have enacted statutes and ordinances like the one before this Court for the purpose of protecting minors from the effects of material harmful to minors. In order to avoid suppression of ideas and creativity and out of respect for the right of adult access to this material, these legislative enactments have carefully and narrowly focused on obscene material, allowed it to continue to be displayed to the public and sold to those persons as to whom it constitutes protected material, and required only that minors not be given that sort of

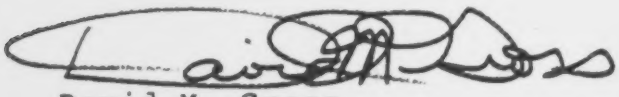
access to the material that would be harmful to them. Out of respect for the many and varied contexts in which material is marketed in our society and out of respect for the intelligence and creative abilities of the merchants, these enactments have not limited the ability of the merchants to constructively market their wares to adults while at the same time addressing the harms of obscenity as to children.

The Fourth Circuit Court of Appeals has taken away the ability of a community even to try to address their concerns in this area by misconstruing the Virginia Statute, misconstruing and misapplying the constitutional doctrines and decisions of this Court, and by imposing diametrically opposing, mutually exclusive, requirements on any approach to this legitimate concern. There are other Courts of Appeals which have addressed the concerns raised in this case

and reached results contrary to that of the Fourth Circuit by following earlier decisions of this Court. Because of the conflict presented and the confusion engendered by the constitutional dimension of the conflict, lawmakers across the country look to this Court for the clarity and guidance in this area that only this Court can provide at a time when it is necessary to do so.

Respectfully submitted,

Robert J. Alfton
City Attorney
City of Minneapolis



David M. Gross
Assistant City Attorney

January 23, 1987

APPENDIX

Minneapolis Star and Tribune

Established 1867

Roger Parkinson Publisher and President
Joel R. Kramer Executive Editor
Tim J. McGuire Managing Editor
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10A

Monday, January 6, 1986

A constitutional way to control porn

Minneapolis residents may differ about whether adults should be free to buy pornography, but most concur that children shouldn't be exposed to it. That is the logic behind the city's opaque-cover ordinance, which shields youngsters from sexually explicit magazines without hindering adults from buying them. Upheld last week by the 8th U.S. Circuit Court of Appeals, the ordinance draws a sensible line between the First Amendment rights of adults and the sensitivity of children.

Passed by the Minneapolis City Council in the summer of 1984, the anti-porn ordinance requires sexually explicit material that could be seen by minors to be displayed for sale in sealed wrappers and under opaque covers. The new requirement looked like a practical way to control pornography's negative effects. But to some magazine sellers, it looked like censorship. The sellers sued, claiming that the city had overstepped its authority to regulate explicit material and had unconstitutionally limited adults' access to such magazines.

Courts are correctly attentive to claims of censorship. Upon close examination, many seemingly innocuous regulations turn out to be schemes for censoring unpopular publications. But District Judge Harry MacLaughlin, who heard the magazine sellers' case last year, could find no such purpose in the opaque-cover ordinance. Neither could the appeals court, which affirmed MacLaughlin's ruling by a 2-1 vote. Writing for the majority, Circuit Judge Pasco Bowman declared that the ordinance is a permissible strategy for protecting minors from obscene materials. Any restriction on adults, Bowman concluded, "is merely an incidental effect of the permissible regulation and is minimal in its impact."

That assessment didn't sway Chief Judge Donald Lay, the appellate panel's lone dissenter. "If the First Amendment means anything," Lay wrote, "it should be clear that the Minneapolis ordinance is unconstitutional on its face." Lay places admirable emphasis on the rights of magazine sellers and readers. But as Bowman's opinion noted, the ordinance does little to curtail those rights. Adults are still free to request a review copy from a merchant or to visit bookstores where magazines remain unsealed in adults-only sections. And adults can still obtain full access to such magazines in the old-fashioned way: by purchasing them.

Pornography's offensiveness is no reason to suppress it, as Lay's thoughtful dissent suggests. But the opaque-cover ordinance isn't censorship. It protects children from tasteless magazines without substantially limiting the access of adults. It thus achieves two desirable ends: controlling pornography's troubling side-effects while leaving adults free to sell, buy and read whatever they like.

Supreme Court, U.S.
FILED
APR 20 1987
JOSEPH F. SPANIOL, JR
CLERK

(6)

NO. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

AMERICAN BOOKSELLERS, ASS'N, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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90 pp

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Notice of Appeal to the Supreme Court of the United States Filed on Behalf of the Commonwealth of Virginia in *American Booksellers Assoc., et al., v. Commonwealth of Virginia, et al.*, Civil Action No. 85-1961 and 85-2284 ..... Supp. App. 13

DOCKET ENTRIES
DISTRICT COURT RECORD

DATE	NR.	PROCEEDINGS
Jul 16	1	COMPLAINT—filed.
Jul 16	2	NOTICE returnable 7-19-85 together with restraining order and MOTION for a preliminary injunction; affidavits of Heather Florence, Helen Ross, Carol Johnson and Amy Bush; MEMORANDUM of points and authorities in support of temporary restraining order and motion for prel inj.—filed by pltfs.
Jul 16	3	ORDERED that Lloyd Thompson be and hereby is authorized and appointed to serve the above process (JCC) Entered and filed. Copy sent.
Jul 16	--	SUMMONS (orig. and 2) issued and given to Lloyd Thompson to serve.
Jul. 18	4	MEMO. in opposition to application for TRO and preliminary injunction filed by deft. Strobel.
Jul 19	5	RETURN on service by Lloyd Thompson executed 7-16-85 as to both defts.
Jul 19	--	TRIAL PROCEEDINGS: Williams, J. Linnell, R. Matter came on for pltfs' motion for TRO and for PI. Counsel appeared and argued same. Case to be continued and if either deft jurisdiction attempts to enforce the law then TRO shall issue upon request by pltfs. Pltfs' counsel to prepare order.

Jul 22 6 ORDER and CERTIFICATION of Constitutional Question, ordering that the application for TRO is continued, based upon representations by defense counsel that defts will voluntarily refrain from enforcing said amendment pending further proceedings herein; counsel for pltfs may by telephone, renew their request for interim relief in the event circumstances so warrant; ordered that the fact that this action questions the constitutionality of a statute of the Commonwealth of VA be, and hereby is, certified to the Attorney General of the Commonwealth, who shall be provided copies of the complaint and motions filed herein, and be permitted to intervene on behalf of the Commonwealth, ***; further ordered that the Attorney General advise the Court and all counsel, of his decision regarding intervention no later than July 26, 1985; in the event the Attorney General does intervene, he shall file any pleadings and memoranda by August 2, 1985; and hearing for a preliminary injunction is scheduled for 10:00 am on August 9, 1985—entered and filed. (RLW) Certified copies to counsel.

Jul 26 7 MOTION to intervene; MEMORANDUM IN support of same—filed by Att. General

Jul 29 8 ORDERED that the Court alters the schedule of this case as follows: the named defts' time for answering pltfs' complaint is continued until further notice by the Court; defts. are to file all

pre-trial motions and accompanying briefs no later than August 16, 1985; to file their written response to defts' motions no later than August 30, 1985. The Court will take evidence and hear argument motions on September 5, 1985 at 12:00 p.m. (RLW) Entered and filed. Copies sent.

Aug 16 9 MOTION to dismiss; BRIEF in support of same—filed by Attorney General.

Aug 30 10 MEMORANDUM of law in opposition to defts' motion to dismiss—filed by pltfs.

Sep 05 -- TRIAL PROCEEDINGS: Williams, J. Linnell, R. Matter came on for pretrial motions. Counsel appeared. Evidence was adduced and the parties rested. Closing arguments were made. A memorandum opinion and order shall issue next week.

Sept 10 11 MEMORANDUM OPINION (RLW) Entered and filed. Copies sent.

Sept 10 12 ORDER in accordance with Memorandum Opinion that the defts' motion to dismiss is GRANTED as to pltfs Jessica and Amy Bush, and DENIED as to the other pltfs. Furthermore, for reasons stated in accompanying memorandum opinion, the Court finds in favor and PERMANENTLY ENJOINS the defts. from forcing the amendment. (RLW) Entered and filed. Copies sent.

Sept 16 13 NOTICE of appeal of order of 9-10-85—filed by Commonwealth of Virginia. Copy of notice, docket sheet and order to USCA and opposing counsel.

Sept 23	14	NOTICE of filing appeal of order of 9-10-85—filed by deft. William K. Stover. Copy of notice, docket sheet and order to USCA and opposing counsel.
Sept 30	15	APPLICATION for costs—filed by pltfs.
Sept 30	16	AFFIRMANCE of Robert Plotkin in support of application for attorney's fees and costs—filed.
Sept 30	17	AFFIRMANCE OF Victor M. Glasberg in support of application for attorney's fees and costs—filed.
Oct 8	18	MEMORANDUM relating to pltfs' application for costs—filed by deft. Strobel.
Oct 9	19	OBJECTION to and motion to reduce pltfs' application for costs—filed by Stover.
Oct 9	10	OBJECTIONS to pltfs' application for award of attorney's fees—filed by Commonwealth of VA.
Oct 9	21	BRIEF in support of objections to pltfs' application for award of attorney's fees—filed by Commonwealth of Va.
Oct 16	22	SECOND affirmance of Victor M. Glasberg —filed.
Oct 23	23	ORDERED for the reasons stated below, the Court DENIES pltf's application and disallows all fees. (RLW) Entered and filed. Copies sent.
Nov. 4	24	NOTICE returnable (no date) for hearing MOTION for reconsideration; MEMO.; AFFIDAVIT of Michael A. Bamberger —filed by pltfs.

Nov. 19 -- TRIAL PROCEEDINGS: Williams, J., Halasz, OCR. Parties by counsel. Matter came on for hearing on pltfs' motion for atty. fees. Motion heard: denied.

Nov 19 25 MOTION For extension of time within which to file application for costs filed by pltfs. on 9-19-85.

Nov 19 26 RESPONSE to Pltfs' motion for reconsideration of denial of attorneys' fees filed by Commonwealth of Va. on 11-14-85.

Nov 19 27 BRIEF in support of Commonwealth of Va's response to motion to reconsider denial of attorneys' fees filed on 11-14-85.

Nov 19 Vol II TRANSCRIPT of hearing on 9-5-85 filed on 11-15-85.

Nov 19 28 ORDERED that pltfs' motion for reconsideration of denial of attorneys fees is DENIED. (RLW) Entered and filed. Copies sent.

Nov 19 29 MOTION In opposition to the granting of injunctive relief, MOTION to dismiss and objection of William K. Stover filed by deft. Stover on 7-18-85.

DOCKET ENTRIES
RECORD OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT
NO. 85-1961

DATE	FILINGS PROCEEDINGS
9 20 85	Case docketed. Awaiting ROA.
9 24 85	ORDER requiring single brief per side.
9 30 85	I S PURCHASE ORDER rec'd by Linnell 9 17 85 filed.
10 2 85	DISCLOSURE STMNT, A, N, filed.
10 2 85	MOTION (J-7) As to expedite briefing and argument, filed
10 2 85	MOTION (J-8) of A-William A. Stover for leave to submit a separate brief, filed
10 3 85	ORDER cons. 85-1961 and 85-1999 filed.
10 10 85	MEMORANDUM of A-Commonwealth of Virginia in support of motion (J-7) to expedite, filed
10 10 85	MEMORANDUM of A-Stover in response to A-Commonwealth of Virginia's motion (J-7) to expedite, filed
10 10 85	RESPONSE of A-Commonwealth of Virginia to A-Stover's motion (J-8) for leave to file separate brief, filed
10 11 85	DISCLOSURE STMNT, Stover, N, filed.
10 16 85	TRANSCRIPT PURCHASE ORDER received by N. Linnell on 10 10 85, filed.
11 25 85	DISCLOSURE STMNT, Nat'l Assn. of College Stores and Periodical Distributors Assn., N, filed.

11 26 85 MOTION (J-7) of A Stover, for leave of Court to submit a separate brief, filed.

11 26 85 MOTION (J-8) of A to expedite briefing and oral argument, filed.

11 27 85 ORDER granting motions of As to expedite briefing and oral argument and A-Stover to file separate brief; the combined length of Commonwealth of Va. and Stover briefs shall not exceed 50 pages; expedited briefing schedule BRF & JNT APPX of Commonwealth of Va. and Stover due 12 17 85, Es due 1 6 86, As' reply brief due 1 16 86; tentatively calendared for February term, filed. Copy to Smith-McLees; Glasberg; Tramblian; Bamberger; Plotkin

11 27 85 DISCLOSURE STMNT (Partial) for Assn. of American Publishers, Y, filed.

11 29 85 DISCLOSURE STMNT, Books Unltd. and Ampersand Books, N, filed.

12 04 85 DESIGNATION, (Commonwealth), of parts of ROA to be included in the joint appendix, filed.

12 06 85 LETTER directing E's to fle a final list of all associations and affiliates by 12 13 85. Copies to all counsel.

12-12-85 JOINT MOTION (M-67) to alter briefing schedule, filed

12-16-85 ORDER granting motion M-67, As' opening brief due 12-19-85, filed. Copy of order sent to Smith-McLees; Tramblian; Bamberger and Plotkin.

01 07 86 ORDER consolidating cases 85-1961(L), 85-1999, 85-2284 for briefing and oral argument, filed.

01 10 86 DISCLOSURE STMNT. Commonwealth of VA., N. filed.

01 10 86 STIPULATION that volume 2 of the joint appendix shall include stipulated documents. filed.

01 14 86 DISCLOSURE STMNT. Strobel, N. filed.

6 26 86 PETITION (D-159) FOR REHEARING & SUGG. FOR REHEARING IN BANC of William K. Stover. filed.

6 30 86 Transmitted petition (D-159) to JDP JMS CFH w copy to all active circuit judges on 6 30 86.

06 25 86 Bill of costs. A. filed.

07 11 86 Objections to bill of costs. Defendant (Charles T. Strobel); filed.

07 18 86 ANSWER (D-159) of Es' to Stover's petition for rehearing and suggestion for rehearing in banc. filed (SAR:cw) Transmitted to JDP JMS CFH with copies to all active circuit judges on 07 21 86.

09-26-86 ORDER denying Stover's petition for rehearing and suggestion for rehearing in banc. filed (SAR:cw) Copy to Smith; Bamberger and Plotkin.

10 02 86 MOTION (D-211) of Commonwealth of VA to stay the mandate. filed. Transmitted to JDP JMS CFH. Telephone call made to alert them to its arrival.

10 3 86 MOTION (D-212) of Stover to stay mandate. filed. Transmitted to JDP, JMS, CFH, SAR:cb

10 07 86 ORDER granting motions for stay of mandate. filed. Copies to counsel on 10 08 86.

10 08 86 RESPONSE in opposition of E's (D-211) to Commonwealth of Va's motion to stay mandate, filed SAR:cb. Transmitted to JDP, JMS, CFH

10 09 86 NOTICE OF APPEAL TO THE SUPREME COURT, filed.

01 15 87 Supreme Court Certificate of Docketing (on 12 24 86) filed.

NO. 85-1999

DATE	FILINGS - PROCEEDINGS
9 30 85	Case docketed. Awaiting ROA.
10 3 85	ORDER cons. 85-1961 and 85-1999 filed.

---

10 3 85 SEE (L) 85-1961 FOR FURTHER PROCEEDINGS.

6 26 86 PETITION (D-159) FOR REHEARING & SUGG. FOR REHEARING IN BANC of William K. Stover, filed.

6 30 86 Transmitted petition (D-159) to JDP JMS CFH w copy to all active circuit judges on 6 30 86.

07 18 86 ANSWER (D-159) of Es' to Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Transmitted to JDP JMS CFH with copies to all active circuit judges on 07 21 86.

09-26-86 ORDER denying Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Copy to Smith; Bamberger and Plotkin.

10 02 86 MOTION (D-211) of Commonwealth for stay of the mandate, filed. Transmitted to JDP, JMS,CFH. Telephone call made to alert panel t. its arrival.

10 07 86 ORDER granting motions for stay of mandate, filed. Copies to counsel on 10 08 86.

10 8 86 RESPONSE in opposition of E's (D-211) to Commonwealth of VA's motion to stay mandate, filed. SAR:cb TRANSMITTED response to JDP, JMS, CFH.

NO. 85-2284

DATE FILINGS—PROCEEDINGS

12 23 85 Case docketed. ROA filed on 12 03 85.

01 07 86 ORDER consolidating cases 85-1961(L), 85-1999, 85-2284 for briefing and oral argument, filed.

CONSOLIDATED SEE 85-1961(L) for further proceedings.

6 26 86 PETITION (D-159) FOR REHEARING & SUGG. FOR REHEARING IN BANC of William K. Stover, filed.

6 30 86 Transmitted petition (D-159) to JDP JMS CFH w copy to all active circuit judges on 6 30 86.

07 18 86 ANSWER (D-159) of Es to Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Transmitted to JDP JMS CFH with copies to all active circuit judges on 07 21 86.

09-26-86 ORDER denying Stover's petition for rehearing and suggestion for rehearing in banc, filed (SAR:cw) Copy to Smith; Bamberger and Plotkin.

10 02 86 MOTION (D-211) of Commonwealth for stay of the mandate, filed. Transmitted to JDP, JMS, CFH. Telephone call made to alert panel to its arrival.

10 07 86 ORDER granting motions for stay of mandate, filed. Copies to counsel on 10 08 86.

10 8 86 RESPONSE in opposition of E's (D-211) to Commonwealth of Va's motion to stay mandate, filed SAR:cb Transmitted response to panel.

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. _____

CIVIL RIGHTS COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

AMERICAN BOOKSELLERS ASSOCIATION, INC.,
122 E. 42nd Street
New York, New York 10017

ASSOCIATION OF AMERICAN PUBLISHERS
1707 L Street, N.W.
Washington, D.C. 20036

COUNCIL FOR PERIODICAL
DISTRIBUTORS ASSOCIATION
488 Madison Avenue
New York, New York 10022

INTERNATIOAL PERIODICAL
DISTRIBUTORS ASSOCIATION, INC.
341 Madison Avenue
New York, New York 10017

NATIONAL ASSOCIATION OF
COLLEGE STORES, INC.
528 E. Loraine Street
Oberlin, Ohio 44074

BOOKS UNLIMITED, INC.
2729 Wilson Boulevard
Arlington, Virginia

AMPERSAND BOOKS
118 King Street
Alexandria, Virginia

AMY BUSH
615 Oakley Place
Alexandria, Virginia

JESSICA BUSH
615 Oakley Place
Alexandria, Virginia
a minor by and through
Amy Bush, her legal
guardian

Plaintiffs,

v.

CHARLES T. STROBEL
Director, Public Safety
City of Alexandria
400 N. Pitt Street
Alexandria, VA 22314

WILLIAM K. STOVER
Chief of Police
County of Arlington
2100 N. 15th Street
Arlington, VA 22201

Defendants.

NATURE OF THE CASE

1. This action seeks preliminarily and permanently to enjoin enforcement of, and to declare facially unconstitutional, and void an Amendment to Section 18.2-391 of the Code of Virginia, effected by Chapter 506 (hereinafter the "Amendment"), on the grounds that it is unconstitutional under the United State Constitution. The Amendment, formerly House Bill No. 1546 became effective on July 1, 1985. A true and correct copy of the Amendment is attached and incorporated hereto as Exhibit A. The language challenged herein as unconstitutional is italicized in Exhibit A.

2. Original Section 18.2-391, enacted in 1975, is part of an enforcement scheme designed to regulate the access of minors to certain sexually-oriented materials believed to be harmful to juveniles by making illegal the sale or loan of such material to juveniles. In March, 1985 the General Assembly of Virginia amended § 18.2-391, extending its prohibitions to the display of such material in any retail establishments, even if patronized legally by minors. The Amendment, by its terms, applies to every bookstore and retail establishment in Virginia where minors may be admitted that offers for sale any printed or visual material, including the covers and book jackets of, advertisements for, and the text of every book sold in this state, without regard to whether the material is obscene as to the adult patrons of these establishments.

3. This Amendment, pertaining to the display of non-obscene materials, presumably intended to further the state's interest in protecting its youth, is not narrowly drawn to further the state's avowed purpose and is unconstitutional in that:

(a) It imposes an unconstitutional prior restraint on the availability, display and distribution of constitutionally protected, non-obscene materials to both adults and minors in all establishments that sell books, magazines or other printed or visual forms of expression;

(b) It is unconstitutionally overbroad;

(c) It is unconstitutionally vague.

JURISDICTION

4. This action arises under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202, and the First, Fifth and Fourteenth Amendments to the United States Constitution, as hereinafter more fully apears. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4). Venue is proper pursuant to 28 U.S.C. § 1391.

PLAINTIFFS

5. The plaintiffs in this action are or represent citizens of Virginia, publishers, wholesalers, retailers, and distributors of books, magazines or newspapers in the State of Virginia, and, in particular, in the County of Arlington and City of Alexandria. The rights and other legal relations of the plaintiffs will be affected by the Amendment, unless it is enjoined.

(a) Plaintiff American Booksellers Association, Inc., is a trade association composed of booksellers located throughout the United States. The Association has approximately 4,500 members, consisting of more than 7,000 private bookstores, department store book stores, and chain book stores, including numerous outlets in the State of Virginia.

(b) Plaintiff Association of American Publishers, Inc., is a trade association organized under the laws of the State of New York. It is the major national association of publishers of general books, textbooks, and educational materials in the United States. Its members publish the vast majority of all general, educational, and religious books and materials produced in the United States, which are sold and distributed to schools, universities, and libraries, and through thousands of book stores, department stores, drug stores, newsstands, and other outlets throughout the United States, including the State of Virginia. The Association has in excess of 300 members, virtually all of whom publish materials sold in the State of Virginia.

(c) Plaintiff Council for Periodical Distributors Association is a national trade association of over 500 independent local wholesaler distributors of magazines, comic books, paperback books, and newspapers. The Council has numerous members in the State of Virginia.

(d) Plaintiff International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States, for ultimate distribution to retailers and the public.

(e) Plaintiff National Association of College Stores, Inc., is a trade association of college stores located throughout the United States. The Association has approximately 2500 members, including several members in the State of Virginia.

(f) Plaintiff, Books Unlimited, Inc., is a general retail bookstore located at 2729 Wilson Boulevard, Arlington, Virginia.

(g) Plaintiff Ampersand Books is a general retail bookstore located at 118 King Street, Alexandria, Virginia.

(h) Plaintiff Amy Bush, Ph.D., resides in Alexandria, Virginia and holds a doctorate in education and counseling. She is a frequent customer of retail outlets where books are sold in Northern Virginia. In addition, she has a professional interest in, and need for, material relating to child and spouse abuse and to other professional literature involving and diagnosis of, and treatment for, sexual dysfunction, marital discord and emotional disturbance.

(i) Plaintiff Jessica Bush is a minor, age 16, who resides in Alexandria, Virginia, and who frequently patronizes retail outlets in Northern Virginia where books are sold. This action is being prosecuted in her name and on her behalf, by her mother and lawful guardian, plaintiff, Amy Bush.

DEFENDANTS

1. (a) Charles T. Strobel is sued in his capacity as the Director of Public Safety in Alexandria, Virginia. He is the chief law enforcement official for that jurisdiction, and as such has responsibility for enforcing the laws of the Commonwealth of Virginia, including the Amendment, in Alexandria.

(b) William K. Stover is sued in his capacity as the Arlington, Virginia, Chief of Police. As police chief, he is responsible for enforcing the laws of the Commonwealth of Virginia, including the Amendment, in Arlington.

IRREPARABLE INJURY

7. There is no adequate remedy at law for the violation of plaintiffs' constitutional rights, and unless the requested injunctive and declaratory relief is granted, plaintiffs and their members will suffer immediate and irreparable loss.

COUNT I

RESTRICTIONS ON ADULT ACCESS TO CONSTITUTIONALLY PROTECTED MATERIAL

8. Under the First and Fourteenth Amendments to the United States Constitution adults, including plaintiff Amy Bush, have the right to view and purchase material within the scope of the First Amendment, including material which is not obscene.

9. It is not possible, under the terms of the Amendment, to restrict the display of materials covered by the Amendment to juveniles without also restricting such access by adults. The Amendment, by prohibiting retail establishments "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" non-obscene material, effectively requires booksellers to remove from their shelves substantial amounts of such

constitutionally protected matter, thereby restricting the right of adult customers to view, peruse and purchase protected literature.

COUNT II

RESTRICTION ON SPEECH (PRIOR RESTRAINT)

10. The Amendment requires the removal of constitutionally protected materials from readily viewed and accessible areas and proscribes having these materials accessible to minors. These restrictions constitute unlawful prior restraints of constitutionally protected speech.

11. The Amendment imposes restrictions on display and manner of distribution which necessarily will result in the removal from circulation of large quantities of materials constitutionally protected as to adults and as to minors in violation of the First Amendment.

12. The Amendment encourages all merchants, including plaintiffs here, selling printed materials to exclude from their establishments all persons under the age of 18 and thereby chills the rights of the plaintiffs to sell materials that are constitutionally protected as to minors or as to adults.

COUNT III

RESTRICTIONS ON MINORS' ACCESS TO CONSTITUTIONALLY PROTECED MATERIALS

13. Under the First and Fourteenth Amendments to the United States Constitution, minors, including plaintiff Jessica Bush, have the right to view and purchase any matter that is not obscene as to such persons.

14. The Amendment is unconstitutional because it prohibits retail establishments from displaying "in a manner whereby juveniles may examine and peruse" certain non-obscene materials, although said material may not be harmful as to all juveniles, depending upon their ages.

15. The Amendment severely inhibits and effectively precludes minors' access to protected material as to all juveniles, and thus the Act violates the constitutional rights of free expression of plaintiffs.

COUNT IV

DUE PROCESS (VAGUENESS)

16. The Amendment is unconstitutionally vague because it fails to provide fair notice as to what constitutes a criminal offense under the Amendment and of the persons or entities to which the Amendment applies, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

17. The Amendment contains several words purporting to describe prohibited acts, which are vague and indefinite and subject to different meanings such that they fail to provide adequate notice of an offense under the Amendment, including the words "display," "harmful to juveniles" and "in a manner whereby juveniles may examine and peruse." The Amendment therefore violates plaintiffs' rights to due process under the Fifth and Fourteenth Amendment to the United States Constitution.

RELIEF

WHEREFORE, plaintiffs pray judgment against the defendants, and each defendant, as follows:

1. That this matter be set for hearing on the requested temporary and preliminary injunctive relief at the earliest practical date;

2. That the Court enter a preliminary and permanent injunction enjoining the defendants and each defendant, and the defendants' agents, attorneys, servants, employees, and other representatives, from enforcing, in any manner whatsoever, any provision of the Amendment;

3. That the Court enter a declaratory judgment that the Amendment is unconstitutional, void, and of no effect;

4. That plaintiffs be awarded the costs of this action;

5. That plaintiffs recover of defendants their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and,

6. That plaintiffs be granted such other and further relief as the Court deems proper.

This 16th day of July, 1985.

Respectfully submitted,

/s/
Robert Plotkin
Michael A. Bamberger
FINLEY, KUMBLE, WAGNER, HEINE,
UNDERBERG, MANLEY, & CASEY
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REPRINT

1985 SESSION

VIRGINIA ACTS OF ASSEMBLY—CHAPTER 506

An Act to amend and reenact § 18.2-391 of the Code of Virginia, relating to prohibited sales and loans of obscene material to juvenile; penalty.

[H 1546]

Approved

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-391 of the Code of Virginia is amended and reenacted as follows:

§ 18.2-391. Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sado-masochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

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AFFIDAVITS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No.

AFFIDAVIT

AMERICAN BOOKSELLERS ASSOCIATION, INC., et al.,

Plaintiff,

v.

CHARLES T. STROBEL,
Director, Public Safety, et al.,

Defendant.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) SS.:

HEATHER GRANT FLORENCE, being duly sworn, deposes and says;

I am a Vice-President, Secretary and General Counsel for Bantam Books, Inc., a publisher of books in all formats, but best known as a publisher of mass market paperbacks, and the Chairman of the Freedom to Read Committee of the Association of American Publishers ("AAP"). I am a graduate of Radcliffe College in Cambridge, Massachusetts, and received my law degree from Columbia Law School. I am a member of the Bar of the State of New York and was in private practice in New York City prior to becoming General Counsel for Bantam Books. During the time I was in private practice, I did a great deal of work for the AAP,

serving as counsel for their Freedom to Read Committee from 1972 through 1975. Bantam Books is a member of the AAP.

On average, Bantam publishes 50 to 60 new titles each month. Approximately 90% of those works, as well as the thousands of paperbacks in print from previous years, are sold in retail outlets such as supermarkets, convenience stores, drug stores, variety stores, airports, lobbies of office buildings and department stores, in addition to traditional bookstores. Only approximately 10% are sold exclusively in the traditional bookstore environment.

Distribution of these materials by Bantam and other publishers is generally not made directly to the non-bookstore retailers, but rather, is made through a jobber or wholesaler. It is generally that wholesaler or jobber rather than the retailer himself who makes the selection of which materials will be carried in these stores.

Moreover, based on available research, the nature of the retail purchaser of mass market paperbacks is such that he or she rarely comes into a store knowing for certain what he or she will buy. Paperbacks are rarely reviewed by critics, so display in the store is essential to the success of a paperback. Accordingly, decisions are more often than not based upon impulse. Original paperbacks thus must be "noticed" on the shelves of a store in order to sell. The wisdom in the industry is that more than 1/2 of the sales of any given paperback results from either the displayed cover or other point-of-sale materials.

I have reviewed the Amendment to Section 18.2-391 of the Code of Virginia which is the subject of this litigation. In requiring a retailer who continues to allow persons under the age of 18 into his premises to remove from display any paperbacks which could be considered "harmful to minors," the First Amendment rights of adults to obtain mass-market paperbacks and other similarly non-pornographic and non-obscene materials will be severely infringed. The Amendment would force the retailer to

undertake the impossible task of reviewing in detail all of the materials he continues to sell in order to determine which could possibly be construed by a prosecutor as falling within the Amendment's proscriptions.

Even with my years of experience as a First Amendment lawyer, application of the "harmful to minors" definition to particular factual situations is virtually impossible. Most especially since the Amendment requires all persons under the age of 18 to be treated as a single group, notwithstanding that the maturity level of an 8-year old is substantially different from that of a 17-year old high school senior. Therefore, in the interest of being cautious, most retailers will probably remove from stock any borderline paperbacks making certain that nothing is offensive to even a beginning reader. This is especially so since given the nature of the paperback market, and that 90% of paperbacks are sold in general retail outlets as well as traditional bookstores, children cannot be banned from entering such premises.

Based upon my intimate knowledge of the book publishing industry and the nature and conduct of titles published, I can state without reservation that enforcement of the Amendment would result in the removal from the shelves of legitimate business establishments many materials that are neither pornographic nor obscene under any federal constitutional guideline, but would nevertheless fall within the Amendment's broad definition of "harmful to minors."

The effect of the Amendment to the Code of Virginia will be to restrict, if not eliminate entirely, the access of adults and minors to many mass market paperbacks, great works of literature, and other similar constitutionally protected materials. Accordingly, the Court should enjoin enforcement of the Act pending trial.

Sworn to before me this
9th day of July, 1984

NOTARY PUBLIC

HEATHER GRANT FLORENCE

SIDNEY LUBLANG
Notary Public, State of New York
No. 24-4622548
Qualified in Kings County
Commission Expires March 30, 19___

Affidavit of Helen G. Ross

1. My name is Helen G. Ross. I am the proprietor of Ampersand Books, which is a general retail bookstore located at 118 King Street in Alexandria, Virginia. Ampersand Books has been in business since 1977. My store sells new books. It is open to all members of the general public, including persons under the age of eighteen. Approximately 10% of our inventory is intended for children and adolescents, and this represents approximately 10% of our revenue.

2. Based upon my knowledge of, and experience with, the retail book business, and also based upon research surveys conducted by the book industry, it is my belief that the average retail purchaser, particularly of mass market paperbacks, enters a store uncertain about what book, if any, he or she may purchase. Furthermore, original paperback books are not routinely reviewed by critics in newspapers or magazines, so that purchase decisions about such books are made on impulse. For these and other reasons, the display of books, in store windows, in racks within a store, and upon the shelves of a store, is critical to the sale of books.

3. Because my store is frequented by minors, and because the display of books is essential to our business, I am concerned that the March, 1985 amendment to § 18.2-391 of the Virginia Code will interfere with our ability to obtain, display and sell books to our customers. As I understand the new law, it would require our store to remove from display any books that could be considered harmful to juveniles. Although I am uncertain as to the exact meaning of "harmful" in this context, I believe that it means that we will not be allowed to display any book or periodical if it contains a narrative description, or pictures, of sexual conduct or nudity.

4. It appears to me that this new law would require us to remove many books currently on the best seller list, many of our romances, as well as many enduring works of literature. Some non-fiction books, such as photography, art books, text books and professional literature could likewise not be displayed. Some books written specifically for minors would be prohibited, such as works by Peter Mayle, who is an acclaimed author of books designed to teach children about human reproduction and human sexuality. While some of these books could be inappropriate for an eight year-old, they might be very appropriate for a fourteen year-old.

5. Strict compliance with the literal terms of the new law is, in my opinion, impossible. The new law would greatly impact our selection of new books, as we would be hesitant to stock any material that, when displayed, might fall within its scope. The new law will also require us to review our entire inventory, and to remove at least 25% to 40% of our current titles to assure that we will not be prosecuted.

6. The only alternatives we see to such censorship of our inventory are two: (a) to restrict a portion of our store to an "adults-only" section, or (b) to prohibit minors' access to our store. Neither of these alternatives are acceptable or feasible because:

(a) Our store is small. We have barely enough room to display our stock at present, and it would be impossible to effectively segregate adult and juvenile books. In addition, the costs associated with the relocation of a large portion of our stock would be substantial. I also believe that our customers, many of whom are accompanied into our store by their children, would strongly object to such segregation, and would cease or reduce their patronage.

(b) It is likewise not feasible for us to restrict minors from our shop. We are located in an area where minors routinely shop, with or without their parents, and minors are frequent customers. As noted above, 10% of our stock is

devoted to juveniles, and the largest portion of such stock is neither "obscene" nor "harmful to juveniles" under any legal definition. Total exclusion would be difficult to enforce and would have serious economic repercussions on our business. Incidentally, our part-time employees often are high-school students under the age of 18. The law would, in effect, force us to discharge such employees rather than risk their exposure to works that could be considered "harmful" to them.

(c) Furthermore, it is my belief, based on current studies, that one of the greatest problems facing America today is illiteracy. Literacy and a free flow of ideas is essential to the maintenance of any democracy. Therefore, prohibiting or impeding the access of minors to book stores would not only adversely effect bookstore and publisher revenues; but, more importantly, would be harmful to the very segment of the public this law is supposed to be protecting, the children; and, therefore, would harm society as a whole.

7. Upon personal knowledge, as well as general information and belief, I understand that many of the same books that my store would be forced to remove from display are on display and available for perusal and loan in public libraries, accessible to juveniles, only blocks from our store.

8. For all these reasons, I believe the Court should restrain and enjoin the appropriate officials from enforcing the new Amendment, and should declare it to be a violation of my First Amendment right to disseminate non-obscene books and periodicals to the general public.

9. I swear under penalty of perjury that the above is true and correct and based on my personal knowledge and belief.

/s/
Helen G. Ross

Dated July 12, 1985

Affidavit of Carol Johnson

1. My name is Carol Johnson. I have lived in Arlington, Virginia, for 18 years. I have been an owner/manager of Books Unlimited, Inc. for 10 years. Books Unlimited is a general retail bookstore located at 2729 Wilson Boulevard. We are next door to a very large baby furniture store and across the street from Sears. Directly behind the store is one of the oldest neighborhoods in Arlington. The store is open to the general public, and our customers represent the broadest possible cross-section in terms of both age and taste.

2. Over the years we have become well known for, and have taken a great deal of time to develop, several areas of specialization. Among them is a children's section so large (35% of our floor space) and so diverse that it rivals most children's book only shops. I am thought of as an authority of sorts on children's literature and one member of my staff, Froma Lippmann, is a well known local authority on special subject books for children, such as those pertaining to death, divorce, and human sexuality. We have both done a great deal in the community, in and outside of the store, using this expertise.

3. Another area of specialization is our huge sections of books on childbirth and parenting, including a good selection of books on sex-education and children and teens. We carry a large selection of psychology and self-help books, including those pertaining to sexuality. The other areas of specialization are mysteries and suspense, the only broad selection of Judaica in Northern Virginia, and fiction. We carry 128 linear shelving feet of general backlist fiction, not including generic fiction, such as science fiction, romances, mysteries or best sellers, but including most of the works of well known authors such as Twain, Hemingway, Fitzgerald, Beattie and Rita Mae Brown.

4. Because of the diverse range of customers my store has cultivated, I am concerned that the March 1985 amendment to § 18.2-391 of the Virginia Code will vastly alter our ability to conduct business in our store. As I understand the new law, it would require us to remove from display any books we think might be considered "harmful to juveniles." I believe it means we will not be able to display or shelve any book or periodical which contains a narrative description or pictures of sexual conduct or nudity. We are concerned here about the vagueness of the terms "harmful" and "sexual conduct" and wonder who will determine what they constitute.

5. The book selection process is, at best, byzantine. Approximately 35,000 new titles are published in a year with 400,000 titles remaining in print on publishers' back lists. In some cases, all booksellers buy from is a list of titles with no descriptions, such as the microfiches sent out weekly and monthly from wholesalers. We buy also from publishers' catalogs. Often the catalog copy is flowery and misleading, designed to attract the store buyer, but not giving complete and accurate information on the books' contents. We also buy from publishers' sales representatives who cannot read every book they present, and often know only what they learn in sales conferences. This is all designed to get the books inside the bookstore, without necessarily giving a clear description of their contents.

6. Because the interpretation of the words "harmful" and "sexual conduct" is not clear to us, and because we cannot read all the books on our shelves nor properly screen new books, we are concerned that the new law would require us to remove from our shelves many books currently on the best seller lists as well as a great deal of modern literature. We are also concerned that display of parts of our sex education and self-help departments would not be allowed. Many well-known authors of young adult literature have dealt with the subject of sexual conduct in their novels, such

as Judy Blume and Norma Klein. These books are *not* appropriate for eight-year olds, but they are indeed appropriate for young people, ages 14 and up.

7. Strict compliance with the liberal terms of the new law would, in my opinion, totally affect the nature of our bookstore. We would have to remove or "butcher" at least three areas of specialization: parenting and psychology, fiction and mysteries. The new law would impact greatly on our selection of new books, as we would be hesitant to stock any material that would fall within its scope. This would make it impossible to remain competitive with stores in the District of Columbia, who would still be able to stock and display the works of bestselling authors such as Andrew Greeley, Robert Ludlum and Sidney Sheldon, while we would not.

8. We see two alternatives to such censorship of our inventory:

(a) To rope off all sections having literature we suspect to contain description of sexual conduct. This would mean censorship on our part, as well as an incredible inconvenience, both to us in terms of reorganizing our stock, and to our customers who would possibly be offended enough to discontinue patronizing our bookstore.

(b) To restrict minors from our bookstore. Since the greatest percentage (40%) of our business is done in children's books and we hold routinely special events such as authors reading from their own work or story telling especially for children, we could not remain in business. In addition to my own two children, we have three teenaged employees, all of whom would have to be discharged.

9. Based upon my personal knowledge, as well as my general information and belief, I understand that many of the same books that my store would be forced to discontinue displaying are on display and are available for perusal in public libraries accessible to juveniles only blocks from our store.

10. For all of these reasons, I believe that the court should restrain and enjoin the appropriate officials from enforcing the new amendment, and should declare it to be in violation of my First Amendment right to disseminate non-obscene books and periodicals to the general public.

11. I swear under penalty of pain and perjury that the above statements are true and correct, based upon my personal knowledge and beliefs.

s/
Carol Johnson

Dated: July 11, 1985

TRANSCRIPT EXCERPTS

* * * * *

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that are sort of indigenous to any First Amendment attack on a statute of this nature. And I pretty well understand the law on it. And I am ultimately going to hold that there is a case or controversy, and that some of these plaintiffs have standing. I rather suspect that the lady and her daughter who may have an abstract right to go into book stores and that sort of right but don't really, aren't really affected by this, that the two Bushes will come out of the case. But other than that, it will continue on apace.

Now, that brings us to the question of abstention. Do you want to submit that, or do you want to argue it?

MR. MCLEES: We will submit that, Your Honor please.

THE COURT: All right. And I rule that this is not an appropriate case for this Court to abstain, because there is no peculiar state law that needs interpreting by a state judge. And he won't have any more advantage than I have in trying to come to grips with this.

So, I deny the request that this Court abstain from considering the case out of deference to state courts.

Now, there are motions for summary judgment and other motions here. But I am not so sure that this case lends itself to disposition by summary judgment, because there are fact issues that I probably need to make specific findings of fact on before I can dispose of the case. And one, the importance of displaying a book, magazine, in order to sell it. And maybe without a proper record, all they do is Ping-Pong it back to me and I have to go back to square one and do my work all over again. So, I would just rather do it right in the beginning.

MR. MCLEES: I understand Your Honor's position. I would ask that the record note my exception.

THE COURT: All right, fine. Call your first witness.

MR. PLOTKIN: Plaintiff calls Helen Ross.

NOTE: The witness is sworn.

HELEN G. ROSS, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you tell the Court your name and address, please.

A. Helen Ross.

THE COURT: And spell your last name.

THE WITNESS: R-o-s-s.

THE COURT: Thank you.

THE WITNESS: And I live in McLean, Virginia.

Q. And are you one of the named plaintiffs in this lawsuits?

A. Yes.

Q. Have you ever testified before?

* * * * *

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by Brentano's?

A. Well, first I was merely a clerk in the paperback department, and then I became a manager of the store after a year or so.

Q. Where was that store located?

A. The first one was in Spring Valley, Northwest D. C., and then Georgetown, a different store.

Q. This is in the District of Columbia?

A. Yes, in the District of Columbia.

Q. And at some point did you leave Brentano's for another endeavor?

A. Then I left Brentano's and looked around for a location for my own store.

Q. Did you find one?

A. Yes, an unfortunate one, but I found one in Bethesda, Maryland, and opened a store there, and also found my present location in Old Town, Alexandria.

Q. Are you a member of the American Booksellers Association?

A. Yes.

Q. What is the address of — What is the name of your book store?

A. Ampersand Books.

Q. What does that mean?

A. The Ampersand is the word for the and sign.

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H.G. Ross — Direct

Q. What is the address of your store?

A. 118 King Street, Alexandria, Virginia.

Q. Would you describe for me the geographic location, area that your store is located in.

A. It is down in the 100 block of King Street, which is — Well the 100 and 200 block of King Street are pretty much the best tourist area in Old Town, Alexandria, with mostly shops and restaurants in that area.

Q. Okay. And in what type of building are you located?

A. In a brick mall that is called the Small Mall, which has eight to ten little shops in the mall aside from my own.

Q. What king of shops are in the mall?

A. They have a plant store, a few gift shops, a deli, a toy store, things like that.

Q. And that mall I take it is open to the public?

A. Yes.

Q. Now, could you describe for the Court the physical layout of your store.

A. Well, the store is about 2,000 square feet, and is roughly rectangular, though with a lot of nooks and crannies here and there.

Q. Is all 2,000 feet devoted to the sale of books?

A. Well, we have a small stock room and two fairly small offices.

Q. Okay. And do you have any windows in your store?

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H.G. Ross — Direct

A. There are windows right on to the street, although the door opens into the mall itself.

Q. There is a window that faces on to King Street?

A. Yes, three.

Q. And then are there in addition other windows inside the mall?

A. Well, actually what we have is three doors, because we used to be three stores, but only one door is open to the public so, the other ones look like windows.

Q. In the window that opens to King Street, what use do you make of that window?

A. Well, right now we are displaying calendars hanging up in the window, and then we try to use our store as a display in itself so when people look in they can see the books that we have.

Q. Okay. With regard to the type of material that you sell in your store, putting aside — I take it, by the way, you sell books in the book store?

A. Yes.

Q. In addition to books, what other kinds of things do you have there?

A. We have records and tapes and stationery items.

Q. Okay. Now, with regard to the books, what type of book store is this? How would you categorize it?

A. General book store that sells books on pretty much all

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different kinds of subjects.

Q. How is your store arranged?

A. Mainly by subject matter. So that we — You know, in different sections which are labeled clearly. We have fiction, reference, biography, sociology, history, psychology, child care, juvenile, what have you.

Q. Approximately how many titles of books do you have in your inventory at any one time?

A. Well, we carry about 15,000 titles. We are out of stock on maybe 10 percent of them at any given time.

Q. So, it would be fair to say that at any one time in your store you have got maybe 12 or 13,000 different titles?

A. Yes, that would be fair.

Q. And you may have more than one copy of each of those titles?

A. Yes. It varies.

Q. And so, if we were talking about total number of books, how many do you think that might be?

A. Oh, heavens. Hard to tell. $100,000 worth, I know that, if that makes any idea.

Q. Do you sell books in your store for children and adolescents?

A. Yes.

Q. You have particular sections for those types of books?

A. Yes, we have a juvenile section.

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H.G. Ross—Direct

Q. Approximately what percent of your sales would you directly attribute to the sale of books in that category?

A. About 10 percent.

Q. Is it common for people under the age of 18 to come into your store?

A. Yes.

Q. Do you encourage them to come into your store?

A. Yes, of course.

Q. Why?

A. Well, for one reason, because I think that illiteracy is a big problem in America, and I think that exposing juveniles to books as early as possible is one of the best ways to combat that problem. And for another reason, they also sometimes make good customers, and quite often are coming in with their parents as a family group.

Q. And I guess young book buyers grow up, or young readers grow up to be book customers later on?

A. We certainly hope so.

Q. With regard to these 15,000 titles in your inventory, who selects the books that you purchase?

A. Well, I select most of them. I also have a manager, Peggy Page, who selects a certain number too.

Q. Would you describe for the Court briefly the selection process.

A. Most of our books are bought directly from publishers,

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H.G. Ross—Direct

A. I don't believe so, right now.

Q. Have you in the past had any employees under the age of 18?

A. Yes, we quite often have part-time high school students, especially at night and weekends.

Q. What king of duties would those part-time employees perform?

A. Well, helping customers first and foremost, ringing up the cash register, and then putting away books, and doing a lot of paperwork that the store has.

Q. Now, this is going to sound like a silly question, but I think it is necessary. Do you display books in your store?

A. Yes.

Q. What do you mean when you use the term display?

A. Well, of course there are different types of display. Actually we pretty much try to have all of our books out on the shelves, which could be considered displaying right

there, that they are available to the customer to walk up and find them. We also try to organize the store in such a way that it is easy for them to find them. And then we do do special displays on the side too, which points up certain books more than others.

Q. How are books, why is it important to display books in a way that customers can find them?

A. Well, for one think, customers tend to be hesitant to ask questions. Some customers will come right up and say, I

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down there that don't even know there is a book store, they get caught by our windows, they come in, they are looking around, that automatically they might not have thought of buying a book at all, and by browsing quite often they pick up a book and buy it. So, just for monetary reasons if nothing else.

Also, I really think that's one of the reasons I like owning a book store, is I like to encourage people to look at books and to read and to get interested in the books. So, it is the type of atmosphere I like to encourage.

Q. Okay. At some point did you become aware that Virginia had passed an amendment to an existing law that could impact upon your display of books?

A. Yes.

Q. Approximately when and how did you learn about that?

A. Well, actually the first week in July when I got a call from a member of the American Booksellers Association, and they explained what the law was about and said they would be sending me reading material. And I had heard of this type of law before, but I wasn't aware that Virginia was considering it.

Q. Okay. Did you later have an opportunity to review the amendment to that law?

A. Yes.

MR. PLOTKIN: Your Honor, at this time I would l like to ask the witness to be allowed to look at a copy of the amendment that is at issue here. I have had this marked as

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H.G. Ross—Direct

Plaintiffs' Exhibit 1. It is simply a copy of the amendment.

THE COURT: But she has testified that she has looked at it.

MR. PLOTKIN: Yes.

THE COURT: And you vouch the record that that is a verbatim copy of the amendment?

MR. PLOTKIN: Yes. It is actually a copy of what was attached to our complaint.

THE COURT: All right.

MR. PLOTKIN: I just thought she might have it there in case she wanted to, I am going to ask her some questions, and I thought she might want to reference it.

THE COURT: But you can hand it to her so that she will have it in front of her.

MR. PLOTKIN: All right.

Q. Are you aware that that amendment provides for criminal penalties for the knowing violation of the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. Have you ever been arrested or charged with a crime?

A. No.

Q. Do you want to avoid criminal prosecution in running your business?

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A. Of course.

Q. If you were required to comply with that law, do you believe it would affect your ability to display books with pictures of nudity in it?

A. Yes.

Q. Do you believe it would affect your ability to display books with pictures of people engaged in some form of sexual conduct?

A. Yes.

Q. Do you believe it would affect your ability to display books that contained narrative descriptions of sexual conduct?

A. Yes.

Q. And do you believe that it would affect your ability to display books with narrative descriptions of nudity?

A. Yes.

Q. In your estimation, what percentage of your inventory would be included within this display provision?

A. A large percentage, maybe 30 to 50 percent.

Q. Would it include materials that are currently on the hard back and paperback best seller list?

A. Yes, definitely. Mainly fiction.

Q. Would it include books that fall within a category that I believe is referred to as romance?

A. Yes.

Q. Would it affect books that you have in your

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photography department?

A. Yes.

Q. In your art department?

A. Yes.

Q. In your health department?

A. Yes.

Q. In your—

MR. MCLEES: Your Honor, I would object for the record, unless this testimony is limited and there is an understanding this is being admitted just as her belief as to what this law would affect.

MR. PLOTKIN: No, she is relating it to that. She is testifying that this law would have that specific effect upon her business.

THE COURT: Well, your objection is overruled. It is a matter that you can explore on cross-examination.

MR. MCLEES: Very well, Your Honor.

THE COURT: Proceed.

Q. If you were forced to, if you had to comply with the display provisions that are contained in that Virginia law, have you given any consideration to the possible methods that you might explore in order to comply with the law?

A. Yes, we have certainly talked about them. And there doesn't seem to be any really viable way to comply totally with the law and to run the book store in a profitable manner.

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H.G. Ross Direct

about young adult. I don't know how you would get them there so they didn't see the rest of the books that might be on display.

And also, I mean, there is an awful lot of young kids that do go to science fiction, which is, you know, an iffy section too. Just general fiction, some literature that we have in our adult fiction section. It would be very, very hard to have just an adults only section that was totally separate from the rest of the store. It is just too mixed in with the rest of the content of the different sections.

Q. Would it also mean that you would have to review in a specific personal way each of the titles in your inventory?

A. Well, I suppose—

MR. MCLEES: Once again, Your Honor, I would object unless this is limited to her understanding or her belief of what she would have to do.

THE COURT: All right. With that condition, can you answer the question, Mrs. Ross?

THE WITNESS: Yes. From my understanding of the law, if I didn't knowingly realize that a book might have some harmful content in it, then maybe that wouldn't be a problem.

From just my general background of ten years in the book business, of course, there is an awful lot of books that I don't read that I could have a good idea might have some harmful comment in it. And again, as far as my estimates of

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H.G. Ross—Direct

what might be harmful to juveniles under this law, it is pretty much just based on my experience anyway. I don't know absolutely for sure which things would be considered harmful.

Q. Now, the answers to the questions that I am asking you here today are based specifically upon your knowledge of your book store at that location and your experience there and at Brentano's, I guess?

A. Yes.

Q. Thank you.

THE COURT: And the way in which you perceive that this statute would affect your business?

THE WITNESS: Yes.

THE COURT: All right.

Q. I am sorry, I think we were talking about partitioning the store. I was going to ask you, assume that you could in some way segregate out these books. Would it require you or someone on your staff to personally go through and make determinations as to which books went where?

A. Yes. I think we would have to make determinations, plus I don't quite understand whether or not you could allow juveniles in any other section in your store. It probably requires somebody from the staff supervising that particular section too versus the rest of the sections of the store, which would be pretty costly.

Q. Okay. Would it interfere with your ability to hire

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H.G. Ross—Direct

part-time clerks or other peopel under the age of 18, do you think?

A. Yes. I would say that I could not hire anybody under the age of 18. Because just in the general course of events, just opening up books that come from the publishers, then they would be handling books that might be construed to be against the statute.

Q. Okay. Are there any other methods that you have considered as potential ways for complying with the statute?

A. Well, cutting down on the inventory drastically I think again would pretty much make any book store unprofitable. If you have to cut off half of the best seller hard back and paperback fiction list, it would be very hard to make a profit in a book store. It is hard anyway.

Q. Would that also again require you to go through and do almost a book by book review?

A. Yes. I would think that would be the best thing I would do as a citizen, trying to comply with the law as fully as possible.

Q. Any idea how long it might take somebody to review— Let's say 10,000 titles, assume that you can maybe cut out the cooking books or gardening books?

A. Computer books.

Q. Or say 10,000 or 8,000 books, how long would it take someone to look through those to see if they had any

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[41]

spend an awful lot of money and time again buying that number of tags and walking around and putting them in books. Plus the type of tag that you could use. I mean, it would have to be something that would stay in the book, that wouldn't fall out, that wouldn't hurt the book when you put it in the pages. And the other thing is that it would

probably have to very clearly state why the tag was there. And it seems to me, again, that an awful lot of our customers would sort of recoil from a book that said that it was an adult only book, when it may be just something on health that it would have a description of sexuality or something in it.

Q. The Attorney General also suggested in his papers that stores could create a rack of adult only materials with a sign next to it that juveniles could not peruse this material. Would that be feasible in your store?

A. I would think that the way the law is written, it would be — It is too broad to be able to do just one rack or even one half of the store practically, just segregating it would be just too difficult, too confusing.

Q. Because of the 30 to 50 percent of the inventory that would be involved?

A. You would have to have two health sections, to [sic] psych sections, two fiction sections, two poetry sections. It would be a very strange way of setting up a store.

MR. PLOTKIN: Your Honor, what I propose to do, and

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maybe to just save a little time, we have some books here that you

THE COURT: You just state

MR. PLOTKIN: I could just state them for the record and I could ask her a couple general questions.

THE COURT: And they will be received in evidence and given a designation.

Q. The first book is called American Couples by Blumstein, B-l-u-m-s-t-e-i-n, and Schwartz, S-c-h-w-a-r-t-z. Is that a book that you have removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this book located in?

A. Sociology.

Q. And in your review of this book do you believe that it contained narrative sexual descriptions that might run afoul of this amendment?

A. Yes.

Q. And therefore you would not be able to display this book in a place where minors could get it?

A. Correct.

Q. And there is, I would refer just for the record to pages 242 and 243. I don't think we need to read the material into the record, but just so that we have some specificity as to the kinds of things we are talking about.

[43]

H.G. Ross—Direct

Plaintiffs' Exhibit 3 is a paperback book by Jackie Collins entitled Hollywood Wives. Is this a book that was removed from your store?

A. Yes.

Q. And what section was this located in?

A. Fiction.

Q. And to the best of your knowledge, was this book over on the best seller list?

A. Yes.

Q. The New York Times best seller list?

A. Yes, it was.

Q. And I think in this book a reference to a page may be somewhat unnecessary, but I will give you 14 and 15 for the record.

Plaintiffs' Exhibit No. 4 is the Penguin Book of Love Poetry. Is this a book that you removed from your store for purposes of this hearing today?

A. Yes.

Q. And what section did this come from?

A. Poetry.

Q. And would you just describe for the record the cover of that book?

A. Well, the cover is from a painting definitely showing nudity in a woman.

Q. A man and a woman apparently embracing?

[44]

H.G. Ross—Direct

A. I think it is supposed to be—

Q. Child?

A. A God. But, yes.

Q. And we would for the record mark pages 112, a poem by D. H. Lawrence, and page 107. Maybe some others.

Plaintiffs' Exhibit 5 is called the Diamond Waterfall, and it is written by Pamela Haines, H-a-i-n-e-s. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this in?

A. In romance.

Q. Okay. And let me just read the page number out. Pages 44 and 45. And is there another reason why you selected that book as well?

A. Well, the cover does show some nudity between a man and a woman.

Q. Plaintiffs' Exhibit 6 is a book entitled The Family Of Woman, edited by Jerry Mason. Is this a book that you removed from your store to bring here today?

A. Yes.

Q. What section did this come from?

A. Photography.

Q. I would refer for the record — Well, it is unnumbered, these pages are not numbered, I will let the book speak for

[45]

H.G. Ross — Direct

itself.

Q. Plaintiffs' Exhibit 7 is a book entitled The New Our Bodies, Ourselves by the Boston Women's Health Book Collective. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section did this come from?

A. Health.

Q. And is there, to the best of your recollection, is there a chapter in this book on sexuality?

A. Yes.

Q. And it has specific references to such things as birth control and masturbation?

A. Yes.

Q. Plaintiffs' Exhibit 8 is a book by John Updike, U-p-d-i-k-e, entitled the Witches of Eastwick, one word. Is this a book that you removed from your store for this hearing?

A. Yes.

Q. And what department did this come from?

A. Well, it is in fiction and best sellers.

Q. This is currently on the paperback best seller list?

A. I believe so.

Q. And I would refer the Court to 126 and 127 of that book.

If I might have one moment. I think I am just about

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H.G. Ross—Cross

Q. They are arranged by author in fiction?

A. Yes.

Q. I see. Do you arrange books by publisher?

A. No.

Q. Just be subject matter and—

A. Not very often.

Q. And then within the subject matter by author?

A. Well, all of our sections are arranged differently. In something like a fiction section or mystery or romance, it is pretty much straight by author. In home arts it would be by the type individual subject, whether it is carpentry or sowing [sic] or what have you.

Q. I see. Now, when you receive a book and unpack it and put it on the shelf, how do you determine what section to put it in?

A. Well, sometimes you know instantly just by looking at it by the title. Sometimes you have to look inside the fly leaf for a description of it or on the back of the book for a description of the content of the book. Or we have a card system where every title in our store is on a card, and the section that it should go in is labeled on that card. And if

one of our employees is very confused, they can go to the publisher and find that card and figure out where to put it.

Q. Who prepares the cards?

A. Well, all employees prepare the cards.

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H.G. Ross—Cross

be a western, don't you? Or Ludlum, it is going to be a mystery?

THE WITNESS: Yes. Quite often when we are talking to the sales rep— I mean, there is some books that I don't buy because there is no normal section to put it in and I can't see where to display it. But most of the time if there is a question, I would ask them where they would best display it. And there are certain books of course that get in the wrong place. We always have fights over sociology versus history, but why—

Q. I can understand that, I think I would too. Isn't it fair to say that generally from looking at the book, looking at the fly leaf or the back cover, you can tell the subject matter of the book?

A. Yes, generally.

Q. And if you can't, can you talk to the publisher and find out what the general subject matter is?

A. Oh, sure. I can figure it out. I have certain employees that have trouble figuring it out.

Q. Now, you believe, correct me if I am wrong, but you believe that this law, this amendment that was passed, would prohibit you from displaying in your store books that contain a, either a narrative description of sexual conduct or a photograph depicting human nudity, is that correct?

A. Yes, the way I read the law.

[51]

H.G. Ross – Cross

Q. Is that because that's what you believe harmful to juveniles, that's what you believe is harmful to juveniles?

A. Not necessarily my opinion.

Q. You don't believe that a picture, a photograph of human nudity is necessarily harmful to juveniles?

A. Not necessarily.

Q. And you don't believe that descriptions of sexual conduct are necessarily harmful to juveniles?

A. It could be.

Q. But not necessarily?

A. Not necessarily.

Q. Some are and some aren't?

A. Well, right. Certainly some I would not sell to a juvenile.

Q. What books wouldn't you sell to a juvenile?

A. That is getting very specific. Certainly — Well, there is a certain group of books that we get from Grove Press that are Victorian, pretty much old fashioned pornography.

Q. Is Venus in The Country by Anonymous?

A. I would definitely not sell that to a juvenile.

Q. You do sell that in your store though?

A. Yes.

Q. And is A Man With A Maid by Anonymous one of those books also?

A. Yes. I would say anybody by that famous author.

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H.G. Ross—Cross

Anonymous, I would not sell to a juvenile.

Q. You do sell that in your store?

A. Yes.

Q. Where are they located in your store?

A. In the fiction section.

Q. How many different shelves are they on?

A. One, I think. It is about half a shelf.

Q. And is it fair to say by looking at the cover of A Man With A Maid and reading the back of the book, that you or I, I dare say anyone on your staff, could tell that this was a sexually oriented book?

A. Yes.

Q. And you wouldn't sell that to a juvenile?

A. No.

Q. That is because do you believe this is harmful to juveniles?

A. I would feel very uncomfortable having my nephews reading that, yes.

Q. Now, the books that Mr. Plotkin has read into the record and you referred to on direct examination, do you believe they are harmful to juveniles?

A. I don't think I would sell Jackie Collins to a juvenile. American Couples, they would never even try to buy. I mean, it is very hard. I really think that a lot of that depends upon their parent. And I would leave many decisions of

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A. Sure, if I can find it.

MR. PLOTKIN: Your Honor, I am going to, I would like to inquire as to the relevancy as to this line of questioning.

THE COURT: But the proper objection is that I don't allow discovery on an in-trial setting, and this is exactly what that is. So, if you object to it, I will order her to return it to you.

MR. PLOTKIN: I object.

THE COURT: Marshall, return it to counsel. But I do not permit discovery when I am presiding over an evidentiary hearing.

MR. MCLEES: I will withdraw that.

THE COURT: All right.

MR. MCLEES: Thank you, Mrs. Ross.

BY MR. MCLEES: (Continuing)

Q. Did the— In addition to the material you received from American Booksellers, who else, if anyone, told you what this law would mean or told you that it would outlaw nudity and descriptions of sexual conduct?

A. Well, actually I read the law myself. I mean, some of it seems—

Q. You concluded that from reading the law that has been introduced into evidence?

A. Yeah. I mean, that's what it says, I think.

[55]

H.G. Ross—Cross

Q. What does it say about what is harmful to juveniles?

A. Well, of course that's one of the problems with the law in general as well as the amendment, is that that is extremely difficult to know what harmful to juveniles is.

Q. Do you know what the legal definition of harmful to juveniles is?

A. No.

Q. Has anyone read that to you?

A. No. Is there one?

THE COURT: It is in paragraph six.

MR. MCLEES: That's correct.

Q. Did anyone read that to you?

A. A separate legal definition of harmful to juveniles?

Q. Yes.

A. No.

Q. No one ever told you that there was one, did they?

A. I don't know. Not that I remember. What is the legal definition?

Q. Mrs. Ross—

THE COURT: Don't waste my time on that. It is in the statute. And those are legal arguments. We are here now to fleshen out the record from an evidentiary standpoint.

Q. You believe, Mrs. Ross, that you would have to remove books of the type that you have referred to that you brought here today—

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H.G. Ross—Cross

A. I believe I would have to seriously consider it if I wanted to be in line with the law.

Q. And in addition to that, 30 to 50 percent I believe you said of your inventory you would be concerned with?

A. It would have to come under heavy scrutiny, yes.

Q. Do you believe that any of the books that you have brought today when taken as a whole predominantly appeal to the prurient interest of a juvenile?

A. Well, things like Our Bodies, Ourselves, the type of thing I have stopped teen-age kids from looking through, things like that, and pregnancy and child birth and things in the child care section just because of the pictures. I don't think they would probably pick up the Penguin Book of Love Poetry.

Q. The book, Our Bodies, Ourselves and pregnancy and child birth, do you believe that they have scientific value or any other kind of value for juveniles?

A. Well, they have values for people in general that most juveniles are too young to get value out of them right at that time.

Q. Well, apart from very young juveniles, you believe that juveniles in general can get some scientific value from books like that?

A. Out of parts of them, yes.

Q. Are you aware that there has been a law on the books for years that makes it illegal for you to sell books to

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H.G. Ross—Cross

juveniles that are harmful to juveniles?

A. It is this law without the amendment.

Q. You are aware that that has been the law for years?

A. That that was the law, yes. I had not read it before, but I have now.

Q. And what— And I assume you have been trying to comply with that law?

A. Well, except for I hadn't read it. But I certainly tried to comply with, I knew that there was a pornography law in the State of Virginia, and I tried to use good sense in complying with it. I never called for a copy of it.

Q. What books in your store have you refused to sell to juveniles?

A. Actually the matter has never arisen. The store seems to have an atmosphere that does not encourage juveniles to try to come up to buy books that might be really out of line for them to buy.

MR. MCLEES: Your Honor, I would move—

THE COURT: They will be received in evidence and marked as Defendants' Exhibits 1 and 2.

Marshal, hand them to the deputy clerk.

MR. MCLEES: I have nothing further.

THE COURT: Mrs. Ross, you may stand down. There is no need for any redirect on it.

NOTE: The witness stood down.

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THE COURT: Call your next witness.

MR. PLOTKIN: As plaintiffs' next witness, Your Honor, we would call Mrs. Heather Florence.

THE COURT: Now, to what extent will this be cumulative of what you have already put on?

MR. PLOTKIN: I don't believe it will be cumulative at all, because this witness is not a book seller She is someone involved from the publishing end of it. And with

the Court's permission, just in the, in our spirit of dividing up some of the work, I would ask the Court to allow Mr. Bamberger to conduct the examination.

THE COURT: Certainly, no problem.

NOTE: The witness is sworn.

HEATHER GRANT FLORENCE, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BAMBERGER:

Q. Mrs. Florence, would you please state your full name for the Court.

A. Heather, H-e-a-t-h-e-r, middle name Grant, G-r-a-n-t, last name F-l-o-r-e-n-c-e.

Q. Where do you reside, Mrs. Florence?

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A. Connecticut.

Q. And what is your present occupation?

A. I am a vice-president and the general counsel of Bantam Books.

Q. Mrs. Florence, are you married?

A. Yes, I am.

Q. Do you have any children?

A. Yes, I do.

Q. How many and of what age and sex?

A. I have one son who is six-and-a-half, just started second grade.

Q. Would you please describe to the Court your education.

A. After completing public high school I went to Radcliffe College where I received a B.A., magna cum laude. And then went to the Columbia Law School in New York and got a J.D. degree. That's the extent of it.

Q. When you completed law school, what did you do then?

A. I went into the private practice of law as an associate in the law firm in New York City of Weil, Gotshal and Manges. That was my first job.

Q. How long were you with that firm?

A. I was associated with that firm approximately five years.

Q. And what was your next business employment?

A. I went to another law firm in New York, Lankenau

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H.G. Florence—Direct

Q. Is Bantam Books a member of that association?

A. Yes, it is.

Q. Would you describe your present duties with Bantam Books, please.

A. Well, in my capacity as the—

THE COURT: Counsel, this has been interesting, but you have about burned it out. Let's move on to issues that are germane to this case immediately.

MR. BAMBERGER: Yes, Your Honor.

Q. Would you please describe to us the range and nature of material published by Bantam Books.

A. Bantam publishes books in a manner of formats; hard cover recently, traditionally only paperback books. We publish all sizes of books, oversized, and most of our books are rack size, mass market, paperback books. We publish approximately 50 to 60 different titles every single month, comes out over three to 400 titles a year. And the range of subject matters and age levels is very extensive.

Q. Do you publish both original works and reprints of hard cover books?

A. Yes. Our paperback line is composed of reprints of hard cover books that we have published and that other publishers first published in hard cover, and also a number of books that are published for the first time in paperback which we call originals.

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[65]

you apply that standard to manuscripts coming into Bantam Books and advise them whether or not the books could be freely sold, freely displayed in the Commonwealth of Virginia?

MR. MCLEES: Objection, Your Honor, relevancy.

THE COURT: The objection is overruled.

A. Well, I could find it virtually impossible to do that apart from perhaps using an educated or knowledgeable guess as to what would fall within the statute, which is difficult. It would be a monumental task. It would really require reading probably 90 percent of the fiction titles that come through the house, and probably about 25 percent of the nonfiction titles. And it would be virtually impossible to get that much work done in my apartment.

MR. BAMBERGER: I have no further questions.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Florence, since you advise your employer on First Amendment issues, I presume you are aware that there, there is and has been for several years in Virginia a law prohibiting the sale to juveniles of materials that are harmful to juveniles?

A. I am aware that such a law exists in many states. And

[66]

H.G. Florence—Cross

I was not particularly aware that there was one in Virginia, but I am aware that those laws exist, and our books are distributed nationwide. So, for all intents and purposes, yes.

Q. And you are aware that the same definition of harmful to juveniles that counsel showed you a few minutes ago is the definition that is used in Virginia and many other states?

A. It is.

Q. In those laws forbidding the sale of materials of that sort to juveniles?

A. Yes.

Q. And I am sure in your duties you have advised your employer concerning what books can be sold to juveniles, haven't you?

A. Actually I have never had the need to since my employer is not in the retail end of the business. And the only books that are clearly directed to a juvenile audience, we do have a large young reader publishing program, would, based on the editorial selection of that material, not contain matter which is defined as harmful to juveniles. So, it has never arisen for me.

Q. So, the matter has never arisen. Your employer doesn't make a practice then of advising retailers that buy Bantam Books what books can be sold to juveniles or not?

A. It is certainly not our practice from a legal standpoint. I believe that when our sales representatives

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C. Johnson — Direct

CAROL JOHNSON, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you state your name and address for the record, please.

A. Carol Johnson, I live in Arlington, Virginia.

Q. Are you one of the named plaintiffs in this lawsuit?

A. Yes, I am.

Q. How long have you lived in Arlington?

A. 17 years.

Q. Are you married?

A. Yes.

Q. Do you have children?

A. Yes.

Q. How many?

A. Two, in the Arlington school system.

Q. And their ages?

A. Almost 12 and almost 16.

Q. And what is your present occupation?

A. I am owner manager of Books Unlimted in Arlington, Virginia.

THE COURT: Of which?

THE WITNESS: Books Unlimited.

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C. Johnson—Direct

Q. Mrs. Johnson, you might want to lean forward a little bit because we are having a little difficulty picking up your voice.

A. How is that?

Q. Fine. How long have you owned Books Unlimited?

A. Ten years.

Q. And are you a member of the American Booksellers Association?

A. Yes, I am.

Q. Would you describe the geographic location of your store.

A. We are located in the Clarendon section of Arlington. Clarendon was the original central business district in Arlington, and it is now under a great deal of reorganization and redevelopment. It is a very interesting neighborhood. We have a lot of ethnic restraurants. We have a wonderful baby furniture store next door, a big Sears across the street. A nice neighborhood directly behind us. We have a park three blocks away. We have a large elementary school six blocks away. We have a lot of walk-in traffic.

Q. Okay. Would you describe the size and the physical layout of your store.

A. About 1200 square feet of selling space, 150 or 200 in the back room. It is very long and narrow. As you walk in the front door, there are two alcoves directly behind you, they

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C. Johnson Direct

have big picture windows that are visible from the street. The rest of the layout of the store, there are floor to ceiling book shelves as you walk down, with a central counter. And then about half way down the store there are little like library stacks, and then more floor to ceiling shelving in the back.

Q. And would you describe for the Court the way your inventory is organized.

A. By subject matter. And then as a general rule, in alphabetical order by author within the subject matter, except where it doesn't fit.

Q. And you heard Mrs. Ross testify earlier about her store was organized into different subject materials?

A. Right.

Q. And so forth. Would you generally adopt that

A. Everybody has their own system, but we have mental health, parenting, biography, history, best seller, new releases, science fiction, everything.

Q. Okay, thank you. Is your store open to minors?

A. Absolutely.

Q. What percent of your sales occur in your children and young adult books?

A. 40 percent of our sales annually are from the children's section.

Q. And what percentage of your inventory would you

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C. Johnson—Direct

and some elementary schools.

Q. Do you have a special section for young adults?

A. Yes, I do, a large one.

Q. Why?

A. My children are older now and I am interested in young adult literature more so than I was when I first got started. There is a lot of really good literature.

Q. I take it in the store where you are located, you don't lump all the children's books in one section?

A. No. It is a very large section, so that I have divided it up.

Q. What types of books are located in the young adult section?

A. In the young adult section it is almost entirely fiction. We figure that by the time the children are designated as young adults, they pretty much have the run of the store for nonfiction items.

Q. What age would you think of as being young adults for purposes of that?

A. 12 up, 12 to 18.

Q. Are there, in the books that are contained in the young adult sections, are there references in some of those books to sexual conduct?

A. Yes, there are.

Q. Are there references or are there pictures of nudity,

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C. Johnson—Direct

human nudity in those books?

A. No, not in those books, no pictures.

Q. Do you have a section on science fiction?

A. Yes.

Q. Are those books popular with young readers?

A. Very.

Q. Do some of the science fiction titles contain narrative descriptions of sexual conduct?

A. Absolutely.

Q. Do you carry books known as best sellers?

A. Yes.

Q. And do any of those books contain discussions of sexual conduct?

A. As far as I know, yes.

Q. And you have a section on mystery and suspense?

A. Yes.

Q. Do those books contain discussions—

A. Yes.

Q. Have you ever refused to sell a book to a juvenile?

A. Yes.

Q. Why?

A. Mainly because I thought they were too young for the material that they brought up to counter. Several times I have refused to sell Judy Blume Forever without a note from their parents.

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C. Johnson—Direct

Q. And that is a decision— How would you make a decision as to whether or not to sell a particular book to a particular individual?

A. Arbitrarily. I am a parent, and I would just make that decision as a parent.

Q. And would you make that in the context of somebody coming forward to the counter and handing you a book that they wanted to purchase?

A. Yes. I even refused to sell Forever to her parent because I thought her child was too young, and she wrote me a letter of thanks afterwards.

Q. Who selects the books for your inventory?

A. I do 90 to 95 percent of my buying.

Q. How many titles do you have in your inventory?

A. 15 to 20,000.

Q. Do you employ any people under the age of 18 as did Mrs. Ross?

A. Yes.

Q. And would they conduct the similar kinds of duties that she described?

A. They do everything, yeah, I mean everything but buy and make any kind of financial decisions, yes. It is a small store, they have to pull their weight.

Q. I take it like Mrs. Ross you display books in your store?

[75]

C. Johnson — Direct

A. Yes.

Q. How do you display them, what methods do you use?

A. Because I have a small space and so many titles, some of the books are face out, many more of them are spine out. But they are available, as many as I can, at eye level, and the rest within easy reach of the hand all along the shelves.

Q. Why is that important?

A. Sometimes there is only one of us manning the store, but even when there are three of us, we are very likely to be busy with customers or the telephone or the cash register. And so, for practical purposes it is necessary for customers to do their own shopping. Plus they pick up things, you know, that we wouldn't imagine they are interested in if they are just allowed to wander around.

Q. Did there come a time when you learned that Virginia had passed a law that might impact upon your ability to display certain books?

A. Yes.

Q. When was that and how did you come to find out about it?

A. It was the week before it went into effect, and I was contacted by the media coalition from the ABA. But I knew it was coming since I had been reading about it.

Q. Have you since had an opportunity to read the law?

A. Yes.

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C. Johnson—Direct

Q. If you were required to comply with the law, would it have any impact on your ability to display books in your store?

A. I think it would have a tremendous impact.

Q. Why?

A. Because so much of my business is done with juveniles. Because I have, I have classes coming into my store as a field trip from schools. And if I was worried about what I have on the shelf, I would have to say that they couldn't do that anymore.

Q. Can you estimate for the Court what percentage of your inventory might fall within the purview of the display requirements?

A. It would be less than Helen's because so much of it is children's, but I would think that maybe up to 30 percent.

Q. Do you know that it is a crime to violate the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. If you were forced to comply with these display provisions, what options might be available to you? I take it you heard Mrs. Ross testify about the options that she had available. Do you think it might require you to remove books from—

A. I do. And I think it would require me to greatly

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C. Johnson—Direct

tailor the way that I buy new books.

Q. In what sense?

A. Well, not all the books that you buy come from a publisher representatives' sales pitch. A lot of them just come from picking things up off of lists. And it is very difficult from reading a list to know what the contents of a book is, and you would really just have to leave out everything you couldn't ask questions about.

Q. Would it be possible for you to go around and put special tags on the books that you thought might be potentially covered by this law?

A. It would be very difficult to know which books to put tags on. Where I had an inkling, I would hate to pull, I would hate for the people to think that I have adults only

books in my stores since they think of it as a family neighborhood book store.

Q. I take it, however, you do have some books that you would consider, certainly consider as being for adults only?

A. Yes, certainly.

Q. Do you have some of those Anonymous books that are referred to?

A. Yes.

Q. By the way, are the all Anonymous books grouped together?

A. Yes.

[78]

C. Johnson - Direct

Q. Is that because the author's first name begins with A?

A. That's not why. Some of them have real authors.

Q. Do you believe that the removal, if you had to remove any books from your store or restricted your buying of titles, that would put you at any competitive disadvantage?

A. Absolutely.

Q. Why?

A. It is hard enough to compete as an independent book seller with the likes of Crown, and they operate area wide. So that if they had to comply with the law in Virginia, they wouldn't have to comply with it in the District and Maryland. That alone is difficult. And then we would have to be competing with other book stores in the District and Maryland who didn't have to comply with the law. We would have to pull best sellers and they wouldn't have to.

Q. I have some books here that we removed, that you removed from the shelves of your book stores, is that correct?

A. Yes.

Q. Each of these books are books that are on display in your store?

A. Yes.

Q. Plaintiffs' Exhibit 9 is a book called Am I Normal, by Jeanne Betancourt, B-e-t-a-n-c-o-u-r-t, an illustrated guide to your changing body. Why do you think this book, you would not be permitted to display this book?

[79]

C. Johnson Direct

A. It shows male nudity.

Q. And is this a book that is specifically designed for adolescents—

A. 12 to 14 year olds, yes.

Q. Plaintiffs' Exhibit 10 is entitled Changing Bodies, Changing Lives, by Ruth Bell and others. Do you believe that you would have some restrictions on your ability to display this book?

A. Yes, I do.

Q. Why?

A. Well, aside from pictures of nudity in there, there is a great deal of sexual description on puberty and teenage sex.

Q. Is this a book again designed primarily for adolescent readers?

A. Yes.

Q. Plaintiffs' Exhibit 11 I think you have alluded to this earlier, it is entitled Forever, by Judy Blume, B-l-u-m-e. Is this a book that you feel you might be prohibited from displaying?

A. Absolutely.

Q. Why?

A. There is quite graphic descriptions of first sexual encounter in the book.

Q. And again, what audience is this book targeted at?

A. Young adults, I would say 14 and up.

[80]

C. Johnson – Direct

Q. Lord Foul's Bane by Stephen R. Donaldson, Plaintiffs' Exhibit 12. Why do you—

A. There is a graphic description of rape in it that is crucial – It is a series of 2,000 pages, it is six books, very popular science fiction.

Q. Plaintiffs' Exhibit 13, entitled Lucifer's Hammer by Larry Niven and Jerry Pournelle, P-o-u-r-n-e-l-l-e. Why do you think you would be restricted from displaying this book?

A. Again, there is sexual content.

Q. And would that be on pages 66 and 67?

A. I think so, yes.

Q. Tender Is The Storm by Johanna Lindsey, Plaintiffs' Exhibit 14. Why—

A. That's because of the cover.

Q. I am sorry, what about the cover?

A. It is male nudity again, rather graphic.

Q. Plaintiffs' Exhibit 15, The Facts of Love by Alex Comfort and Jane Comfort. Why do you think you would have restrictions—

A. Again descriptions of the sexual act as well as pictures. Nudity.

Q. And again, what audience is this book targetted for?

A. Young adults.

Q. Plaintiffs' Exhibit 17, Where Do Babies Come From by Margaret Sheffield, S-h-e-f-f-i-e-l-d. Why do you think that

[81]

you would have trouble displaying this?

A. There are fairly graphic pictures in there. They are lyrically done, but they are fairly graphic.

Q. Do you believe that some of the material that we have just reviewed here are appropriate for older teen-agers, but yet might be harmful for younger children?

A. Yes, I do.

Q. Why?

A. Well, younger kids are just not ready for the information that is involved. Most of the narrative information, the pictures they are just going to titter over, but I think some of the narratives they are just not ready for that kind of information yet. And it is a decision their parents should make with them.

Q. Do you believe that each one of these books or any of these books are necessarily harmful to juveniles?

A. I do not. But someone else might.

Q. And why is it that you would then consider them to be covered by these display provisions?

A. Just because I don't know who's definition of harmful I am to use. And to be safe, I would have to pull them.

MR. PLOTKIN: I have no further questions of this witness.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

[82]

C. Johnson—Cross

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Johnson, do I understand correctly that you believe that this law, this amendment that we are here about, would prohibit you from displaying in your store any book that has a verbal description of sexual conduct or contains a photograph or a picture of human nudity?

A. Pretty much.

Q. Is that correct?

A. Yeah.

Q. Who told you that?

A. I read the law.

Q. Did you read the definition of harmful to juveniles?

A. No, that was not included in—

Q. It wasn't included in the material that was sent to you?

A. I don't believe so.

Q. Did you know there was a legal definition of harmful to juveniles?

A. No. I mean—Yes, I guess I assumed there was, but I hadn't read it.

Q. But you didn't know what it was?

A. No.

Q. Now, you have mentioned a figure I believe that you gave was maybe 30 percent of your inventory would be affected

[83]

C. Johnson - Cross

by this law?

A. Possibly.

Q. And that's because - Do you believe that 30 percent of your inventory is harmful to juveniles?

A. I said up to 30 percent.

Q. Do you believe up to 30 percent?

A. No.

Q. You don't believe it is harmful?

A. No.

Q. But it is your belief that it might come under this law?

A. Sure.

Q. Who do you think under this law will determine what is harmful to juveniles?

A. I would assume it would be the public if there were a complaint, then someone might follow-up on it.

Q. What would happen in your understanding if they followed up on it?

A. I suppose I could be taken to court.

Q. Are you aware that before you could be charged with a violation of this law, a neutral judicial officer would have to find that there was probably cause to believe that the book in question met the legal definition of harmful to juveniles?

A. No, I was not aware of that.

Q. Are you aware that before you could be convicted of

[84]

C. Johnson - Cross

violating this law, you would have a right to have a jury of 12 ordinary people from your community decide whether they were convinced beyond a reasonable doubt that the material that was sold was harmful to juveniles under the legal definition?

A. No.

Q. You were not aware of that?

A. Not explicitly aware, no.

Q. What percentage of your inventory predominantly appeals to the prurient interests of juveniles?

A. Well, I would have no idea.

Q. A large percentage, a small percentage?

A. Probably a very small percentage. Every once in awhile I have to take a book out of the hands of someone, but a very small percentage.

Q. What books do you take out of the hands of someone?

A. The Joy of Sex mostly.

Q. And whose hands do you take that out of?

A. Juveniles.

Q. I see. In your store?

A. Sure.

Q. If they pick it up and peruse it?

A. Yes. Mostly my own children back when I first started, but others included, yes.

Q. Now, what about The Gardens of the Night by Anonymous? You sell that in your store, don't you?

[85]

C. Johnson - Cross

A. No, probably not. I don't keep real close track of those titles.

Q. You do sell books by Anonymous published by Grove Press, don't you?

A. Some of them, sure.

Q. Comparable to this?

A. Comparable.

Q. What about Venus Unbound by Anonymous, you do sell that, don't you?

A. Maybe, possibly.

Q. That's also Grove Press, Anonymous, and you sell books comparable?

A. Some of them, yes.

Q. Do you sell them to juveniles?

A. No.

Q. If juveniles come into your store and pick those up and leaf through them and read them, do you allow them to do that?

A. It has never happened, to my knowledge.

Q. Where are they displayed in the store?

A. In with the books on sex, with the books on sex education.

Q. Do you consider that to be sex education?

A. No, but I keep them away from fiction so that I can keep an eye on them.

[86]

C. Johnson - Cross

Q. What do you consider these Grove Press Anonymous books to be if they are not sex education?

A. Fantasy material.

Q. Now, the books that Mr. Plotkin referred to and that you have brought here today, do you believe they are harmful to juveniles?

A. I believe someone could say that they were, could feel that they were, yes.

Q. Well, let's not, let's not talk about what someone could say. Let's talk about your belief about these books. Do you believe that Where Do Babies Come From by Margaret Sheffield, do you agree that that is lacking in serious literary or artistic or political or scientific value for juveniles?

A. No.

Q. What about The Facts of Love, do you believe that is lacking in serious literary or scientific value for juveniles?

MR. PLOTKIN: I would like to inquire as to what age group we are talking about.

THE COURT: Young adults. Do you want to plug that in, because that is the audience that we are basically talking about.

THE WITNESS: Well, there are even younger children.

MR. MCLEES: Your Honor, it would be our position that legally that is irrelevant.

[87]

C. Johnson - Cross

THE COURT: All right.

Q. What about Changing Bodies, Changing Lives. Do you believe that that is lacking, taken as a whole, lacking in serious literary or scientific value for children?

A. I do not believe that. But I think that it could be harmful to certain children.

Q. It could be harmful, you believe it could be harmful to certain children?

A. Sure.

Q. But you don't believe it is lacking in serious scientific value for children?

A. No.

Q. Now, you mentioned Lord Foul's Bane, I believe that is one of these books also?

A. Yes.

Q. That's a series of six books?

A. Yes, six.

Q. And it has a total of 2,000 pages?

A. Yes. I read it.

Q. And do you sell that to children?

A. I use a lot of judgment with that, because of the rape in the first book.

Q. Now, this rape in the first book is the reason that you feel that under this law you wouldn't be able to display that book?

[88]

C. Johnson – Cross

A. Yes.

Q. How many pages does that rape take up?

A. I don't remember.

Q. Two or three?

A. Maybe longer.

Q. More than ten?

A. Maybe not.

Q. Probably not. More than 15?

A. Around that, probably.

Q. Out of 2,000 pages? Could you give a verbal response please for the benefit of the court reporter?

A. Yes.

Q. You mentioned Judy Blume's book Forever, that you didn't sell that to juveniles, is that right?

A. Well now, what is the definition of juveniles? I do sell it to young adults.

THE COURT: Anyone under 18 as I read the statute.

THE WITNESS: Of course I sell that to juveniles, but I don't sell it to anyone who I think is too immature to read it.

Q. Why?

A. That's the parent in me, I don't think they are ready.

Q. Well, what is it about that book that they are not ready for?

A. There is quite a lot of graphic sexual description

* * * * *

[93]

C. Johnson - Cross

A. I have no idea. A tenth of a percent. Half a shelf.

Q. Are you aware that there has been a law on the books for several years making it legal to sell certain books to juveniles?

A. Yes.

Q. Sexually oriented?

A. Right.

Q. And you have tried to comply with that law?

A. Certainly.

Q. Have you ever been arrested for violating that law?

A. No.

MR. MCLEES: Thank you, nothing further.

MR. PLOTKIN: No further questions, Your Honor.

THE COURT: Thank you, Mrs. Johnson, you may return to your see [sic].

THE COURT: Does that conclude your evidence.

MR. PLOTKIN: Yes, it does, Your Honor. At this time I would like to move the admission of the books that we have submitted into evidence.

THE COURT: All of the books that you made reference to or use of here in the trial are received in evidence.

MR. MCLEES: We would move ours in as defense exhibits.

THE COURT: Bring those up, Marshal. Then that concludes the evidence. I am going to have to write a memorandum opinion in the case. I understand it, and I read

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

AMERICAN BOOKSELLERS
ASSOCIATION, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 85-816-A

CHARLES T. STROBEL,
DIRECTOR, PUBLIC SAFETY, et al.,
Defendants.

ORDER

This matter is before the Court on plaintiffs' application for costs, pursuant to 42 U.S.C. 1988. Defendants have objected to plaintiffs' application and have requested that the fees demanded be reduced. For the reasons stated below, the Court DENIES plaintiff's application and disallows all fees.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that in any action under 42 U.S.C. Section 1983, the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. Section 1988. In exercising its discretion, the court is controlled by the standard set forth in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Under that standard, a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." 390 U.S. at 402. *See also Bonnes v. Long*, 599 F.2d 1316, 1318 (4th Cir. 1979). In this case, the Court finds just such special circumstances.

This case, *American Booksellers*, was a carefully orchestrated attack on a Virginia statute. The statute at issue made it unlawful to display commercially certain materials

deemed harmful to juveniles in such a manner that children could examine and peruse them. *See* Sections 18.2-390 to 391 of the Virginia Code. This statute peculiarly affected one entity, the bookselling industry, and it was that industry that masterminded the assault. Through its attorneys, the industry carefully selected a broad spectrum of litigants to ensure standing. The original plaintiffs included five bookstore trade associations, two individual bookstores and two individual residents of the City of Alexandria. It chose a forum it considered desirable, *i.e.*, one of the more liberal sections of the state, where success at trial was more likely but where actual enforcement of the statue was considerably less likely. And, perhaps most importantly, it filed a 1983 action, even though a declaratory action based on the First Amendment itself would have been more than sufficient. The added attraction of 1983, of course, was the provision for attorneys fees.

When the battle was over and the statute struck down, the beneficiary was, once again, the bookselling industry. With the statute on the books, the industry had faced a massive loss of profits but, through this suit, it managed to protect these revenues. In other words, from the beginning, this case was a suit by a private industry, for a private industry. It is that industry that should now bear the expense, simply as a cost of doing business. To do otherwise would be unfair. The taxpayers should not have to bear the expense of a suit that redounded to the benefit of one industry and one industry alone.

The Court does not mean to suggest that the bookselling industry acted improperly in bringing this case. Nor does it mean to downgrade the importance of this case or the principles it upholds. Freedom of speech and thoughts are of paramount importance and admittedly work to everyone's benefit. However, to the extent that the public benefited, it can pay for that benefit through a one or two cent increase in the price of books. This would effectively spread the cost of the suit and seems more equitable than saddling the State with the bill. The State here acted in good faith, in support of a cause that all must find worthy—the

protection of children. Moreover, the State could not have known that its actions would be found to be unconstitutional since this is a novel area of law.

The Court realizes that probably none of these factors standing alone would justify shielding the State from paying attorney fees. For instance, the law is clear that good faith by itself is not a special circumstance that would make an award of attorney fees unjust. *See, e.g., Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1976). However, with all these factors combined, the Court finds it more equitable to let the costs lie where they land. Those who have benefited the most (which includes the book-buying public) will pay the slight cost of that benefit, and the State will not be penalized for its well-intentioned effort to protect its children.

Let the Clerk send a copy of this order to all counsel of record.

DATE: Oct. 23, 1985

/s/ Richard L. Williams
UNITED STATES DISTRICT JUDGE

No. 86-1034

Supreme Court, U.S.
FILED
JUL 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA,

Appellant,

vs.

AMERICAN BOOKSELLERS, ASS'N, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX — VOL. II
COMPLETE TRIAL TESTIMONY

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THE COURT: All right. And I rule that this is not an appropriate case for this Court to abstain, because there is no peculiar state law that needs interpreting by a state judge. And he won't have any more advantage than I have in trying to come to grips with this.

So, I deny the request that this Court abstain from considering the case out of deference to state courts.

Now, there are motions for summary judgment and other motions here. But I am not so sure that this case lends itself to disposition by summary judgment, because there are fact issues that I probably need to make specific findings of fact on before I can dispose of the case. And one, the importance of displaying a book, magazine, in order to sell it. And maybe

[18]

you can do this by a proffer or stipulation. And two, the expense and difficulty of complying with the new law. And whether any efforts have been made so far to comply with the new law. And maybe not. But you can put on evidence as to what you will do if you didn't have the side bet that had been agreed to where there would be no enforcement until this case was resolved.

And then the commercial feasibility of either building an adult only room or banning minors from the store altogether.

And then what percentage of customers in these stores are adults.

Now, what do you have in the way of evidence that will address those issues? Have you come up with a stipulated record? Or how do you want to handle it?

MR. PLOTKIN: Your Honor, what we would propose to do is we have three witnesses, two of the named plaintiffs who are book store owners, are here in the courtoom today, as well as another individual who has submitted an affidavit, vice-president at Bantam Books to talk about the distribution problems and so forth. I don't believe that their testimony would be terribly lengthy.

In addition, we also have had them bring from their books, from their book stores certain material that we would like to put in as evidence simply to demonstrate the scope and the breadth of the law, at least as we see it, and the kinds of

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material that we believe are not obscene that would be included within the ambit

of this display provision. And that's how we would suggest we proceed at this time.

We have had prior conversations with the Attorney General's Office and they were aware that that was the posture that we were going to take. And at least up until this point they have not objected to that. And in fact, there was some discussion as to whether or not they would want to take depositions of these people prior to the hearing. We did make those people available for depositions, but I was advised that they chose not to. And it was my understanding also that the State was considering the possibility of presenting its own witnesses, but apparently has decided not to present any witnesses in contravention of our position.

So, what we would propose we do at this point, Your Honor, with your permission, is to go ahead and put on our witnesses, put in our exhibits, and then we would rest our case.

THE COURT: All right, fine. That is perfectly agreeable. Is that agreeable with the Commonwealth?

MR. MCLEES: Your Honor, I am John McLees representing the Attorney General's office, I don't believe I have ever had the pleasure of appearing in Your Honor's court before. It is the Attorney General's position, and I believe the position of the other defendants, that evidence is not necessary, that this case can be decided as an issue of law on the basis of the

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pleadings that have been filed.

THE COURT: Well, on the issues that I just enumerated, how do I get a record fleshened out in those areas so that I know what I am coming to grips with, unless it is done by an agreed upon proffer or stipulation.

MR. MCLEES: Well, I am trying to remember all the issues that Your Honor had enumerated. But --

THE COURT: Well here again, the commercial-- I will go backwards on them. What percentage of customers in these stores are adults? And the commercial feasibility of either building an adult only room or banning minors from the stores altogether?

MR. MCLEES: Well, Your Honor, as we have explained in our motion to dismiss, the law on its face does not require what the plaintiffs interpret it as requiring. The plaintiffs interpret

the law as requiring, as forbidding any display of books or materials that are harmful to juveniles.

THE COURT: That's right.

MR. MCLEES: In a place where juveniles are present. And all these factual issues go to proving that they can't do that. As the law is properly interpreted, they don't have to do that. The law does not require them to remove from display altogether in anyplace where juveniles. All it does is require them to display them, to display these materials in such a manner that they are making reasonable good faith efforts to make sure juveniles don't pick them up and examine them and peruse them.

THE COURT: How do I know what sort of problem that is for a book store? It may be the difference in putting them out of business for all I know.

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MR. MCLEES: Well--

THE COURT: And they have to have a staff of trained detectives to spot people that are juveniles, like ABC stores and things of that nature, because, man, you can get prosecuted for selling a beer to a minor so fast it will make your head swim. I would assume, if they had a copy of Playboy in one of these book stores, and a juvenile could come in innocently and pick it up, and there they go.

MR. MCLEES: I think that it is not necessary to take factual evidence for Your Honor to appreciate that merely putting books harmful to juveniles on a rack with a label on the rack that says adults only, and when they, if there comes an occasion when they see a juvenile transgress that sign and pick up that material and examine it and

peruse it, the staff of the store can tell the juvenile that he is not permitted to examine that material.

THE COURT: Well here again, I think that the Fourth Circuit would want a record of some sort in a case of this nature in case it ever goes there, because if I decide it

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without a proper record, all they do is Ping-Pong it back to me and I have to go back to square one and do my work all over again. So, I would just rather do it right in the beginning.

MR. MCLEES: I understand Your Honor's position. I would ask that the record note my exception.

THE COURT: All right, fine. Call your first witness.

MR. PLOTKIN: Plaintiff calls Helen Ross.

NOTE: The witness is sworn.

HELEN G. ROSS, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you tell the Court your name and address, please.

A. Helen Ross.

THE COURT: And spell your last name.

THE WITNESS: R-o-s-s.

THE COURT: Thank you.

THE WITNESS: And I live in McLean, Virginia.

Q. And are you one of the named plaintiffs in this lawsuit?

A. Yes.

Q. Have you ever testified before?

A. No.

Q. You will get the hang of it, just relax. Do you have-- Are you married?

A. Yes.

Q. And would you briefly tell us your educational background.

A. I went to college at Smith in Massachusetts, and then took a year out to be a secretary, and then went to Johns Hopkins and got a Masters in the art of teaching, joint education/history degree.

Q. And following your graduation, what occupation did you--

A. Then I taught in the Montgomery County school system for a few years.

Q. At what level did you teach?

A. High school history.

Q. And did there come a time when you ceased your employment as a teacher

and took up another occupation?

A. Yes.

Q. About when was that?

A. 1975, '76.

Q. What did you do?

A. I went to work for Brentano's, it is a book store and art chain. And tried to learn the book business there with the idea of opening my own book store later.

Q. And what position did you hold while you were employed

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H.G. Ross - Direct

by Brentano's?

A. Well, first I was merely a clerk in the paperback department, and then I became a manager of the store after a year or so.

Q. Where was that store located?

A. The first one was in Spring Valley, Northwest, D.C., and then Georgetown, a different store.

Q. This is in the District of Columbia?

A. Yes, in the District of Columbia.

Q. And at some point did you leave Brentano's for another endeavor?

A. Then I left Brentano's and looked around for a location for my own store.

Q. Did you find one?

A. Yes, an unfortunate one, but I found one in Bethesda, Maryland, and opened a store there, and also found my present location in Old Town, Alexandria.

Q. Are you a member of the American Booksellers Association?

A. Yes.

Q. What is the address of-- What is the name of your book store?

A. Ampersand Books.

Q. What does that mean?

A. The Ampersand is the word for the and sign.

[25]

H.G. Ross - Direct

Q. What is the address of your store?

A. 118 King Street, Alexandria, Virginia.

Q. Would you describe for me the geographic location, the area that your store is located in.

A. It is down in the 100 block of King Street, which is-- Well the 100 and 200 block of King Street are pretty much the best tourist area in Old Town, Alexandria, with mostly shops and restaurants in that area.

Q. Okay. And in what type of building are you located?

A. In a brick mall that is called the Small Mall, which has eight to ten little shops in the mall aside from my own.

Q. What kind of shops are in the mall?

A. They have a plant store, a few gift shops, a deli, a toy store, things like that.

Q. And that mall I take it is open to the public?

A. Yes.

Q. Now, could you describe for the Court the physical layout of your store.

A. Well, the store is about 2,000 square feet, and is roughly rectangular, though with a lot of nooks and crannies here and there.

Q. Is all 2,000 feet devoted to the sale of books?

A. Well, we have a small stock room and two fairly small offices.

Q. Okay. And do you have any windows in your store?

[26]

H.G. Ross - Direct

A. There are windows right on to the street, although the door opens into the mall itself.

Q. There is a window that faces on to King Street?

A. Yes, three.

Q. And then are there in addition other windows inside the mall?

A. Well, actually what we have is three doors, because we used to be three stores, but only one door is open to the public so, the other ones look like windows.

Q. In the window that opens to King Street, what use do you make of that window?

A. Well, right now we are displaying calendars hanging up in the window, and then we try to use our store as a display in itself so when people look in they can see the books that we have.

Q. Okay. With regard to the type of material that you sell in your store, putting aside-- I take it, by the way, you sell books in the book store?

A. Yes.

Q. In addition to books, what other kinds of things do you have there?

A. We have records and tapes and stationery items.

Q. Okay. Now, with regard to the books, what type of book store is this? How would you categorize it?

A. General book store that sells books on a pretty much all

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different kinds of subjects.

Q. How is your store arranged?

A. Mainly by subject matter. So that we-- You know, in different sections which are labeled clearly. We have fiction, reference, biography, sociology, history, psychology, child care, juvenile, what have you.

Q. Approximately how many titles of books do you have in your inventory at any one time?

A. Well, we carry about 15,000 titles. We are out of stock on maybe 10 percent them at any given time.

Q. So, it would be fair to say that at any one time in your store you have got maybe 12 or 13,000 different titles?

A. Yes, that would be fair.

Q. Any you may have more than one copy of each of those titles?

A. Yes. It varies.

Q. And so, if we were talking about total number of books, how many do you think that might be?

A. Oh, heavens. Hard to tell. $100,000 worth, I know that, if that makes any idea.

Q. Do you sell books in your store for children and adolescents?

A. Yes.

Q. You have particular sections for those types of books.

A. Yes, we have a juvenile section.

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H.G. Ross - Direct

Q. Approximately what percent of your sales would you directly attribute to the sale of books in that category?

A. About 10 percent.

Q. Is it common for people under the age of 18 to come into your store?

A. Yes.

Q. Do you encourage them to come into your store?

A. Yes, of course.

Q. Why?

A. Well, for one reason, because I think that illiteracy is a big problem in America, and I think that exposing juveniles to books as early as possible is one of the best ways to combat that problem. And for another reason, they also sometimes make good customers, and quite often are coming in with their parents as a family group.

Q. And I guess young book buyers grow up, or young readers grow up to be book customers later on?

A. We certainly hope so.

Q. With regard to these 15,000 titles in your inventory, who selects the books that you purchase?

A. Well, I select most of them. I also have a manager, Peggy Page, who selects a certain number too.

Q. Would you describe for the Court briefly the selection process.

A. Most of our books are bought directly from publishers,

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H.G. Ross - Direct

and we have publishers representatives that come into our store, and present the new list for the next three to six months. And describe what they are going to do with the particular titles, how much advertising is behind it, what the print run is. Obviously a lot of authors we recognize already and know whether they sell. And we pretty much

go through the list and give them the quantities that we want to order.

Q. When you select, when you decide to purchase one particular book over another, what kind of criteria do you use in making that selection?

A. Well, a number of different criteria based on whether or not the book is going to sell, pretty much. Obviously if it is a known author that we have sold before, than that is something that you would want to buy. How much the publisher is going to back it is another thing. Quite often they will even take a brand new author, the first novel for instance, and they will say that they are going to push this to 50,000 copies and 50,000 ad budget, and that is something that we probably should represent in the store, even though fiction is hard to sell.

Q. Okay. Do you have any employees in your book store?

A. Yes, we have maybe four full-time and two or three part-time. It varies depending on--

Q. Okay. Are any of your employees at present under the age of 18?

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H.G. Ross - Direct

A. I don't believe so, right now.

Q. Have you in the past had any employees under the age of 18?

A. Yes, we quite often have part-time high school students, especially at night and weekends.

Q. What kind of duties would those part-time employees perform?

A. Well, helping customers first and foremost, ringing up the cash register, and then putting away books,

and doing a lot of paperwork that the store has.

Q. Now, this is going to sound like a silly question, but I think it is necessary. Do you display books in your store?

A. Yes.

Q. What do you mean when you use the term display?

A. Well, of course there are different types of display. Actually we pretty much try to have all of our books out on the shelves, which could be considered displaying right there, that they are available to the customer to walk up and find them. We also try to organize the store in such a way that it is easy for them to find them. And then we do do special displays on the side too, which points up certain books more than others.

Q. How are books, why is it important to display books in a way that customers can find them?

A. Well, for one thing, customers tend to be hesitant to ask questions. Some customers will come right up and say, I

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H.G. Ross - Direct

want such and such a book, do you have it. But very many of them kind of wonder around. And I even hear them saying, what do you think, do you think they might have it, do you want to go ask, I don't know, maybe the store doesn't have it. And they are thinking about leaving, and I sort of run up to them and say, can I help you, what would you like, and show them. But it seems to me that we are bound to miss some of that, and I think having the books

organized in a way that they can find themselves is probably the best system.

Q. When you said that you have approximately 15,000 books in your inventory, how many of those are on display at any one time?

A. We would have every title at least out, you know, a certain number of copies. We have very, very few copies in our stockroom, mainly things that we have overstock of out on our floor.

Q. So, it would be fair to say that you have those 15,000 titles out in your inventory and they are out on display in one form or another?

A. Yes.

Q. Do you encourage people to browse in your store?

A. Yes, definitely.

Q. Why?

A. Well, in the first place, we are in an area that a lost of tourists come down, I think a lot of people might even come

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down there that don't even know there is a book store, they get caught by our windows, they come in, they are looking around, that automatically they might not have thought of buying a book at all, and by browsing quite often they pick up a book and buy it. So, just for monetary reasons if nothing else.

Also, I really think that's one of the reasons I like owning a book store, is I like to encourage people to look at books and to read and to get interested in the books. So, it is the type of of atmosphere I like to encourage.

Q. Okay. At some point did you become aware that Virginia had passed an amendment to an existing law that could impact upon your display of books?

A. Yes.

Q. Approximately when and how did you learn about that?

A. Well, actually the first week in July when I got a call from a member of the American Booksellers Association, and they explained what the law was about and said they would be sending me reading material. And I had heard of this type of law before, but I wasn't aware that Virginia was considering it.

Q. Okay. Did you later have an opportunity to review the amendment to that law?

A. Yes.

MR. PLOTKIN: Your Honor, at this time I would like to ask the witness to be allowed to look at a copy of the amendment that is at issue here. I have had this marked as

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H.G. Ross - Direct

Plantiffs' Exhibit 1. It is simply a copy of the amendment.

THE COURT: But she has testified she has looked at it.

MR. PLOTKIN: Yes.

THE COURT: And you vouch the record that that is a verbtaim copy of the amendment?

MR. PLOTKIN: Yes. It is actually a copy of what was attached to our complaint.

THE COURT: All right.

MR. PLOTKIN: I just thought she might have it there in case she

wanted to, I am going to ask her some questions, and I thought she might want to reference it.

THE COURT: But you can hand it to her so that she will have it in front of her.

MR. PLOTKIN: All right.

Q. Are you aware that that amendment provides for criminal penalties for the knowing violation of the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. Have you ever been arrested or charged with a crime?

A. No.

Q. Do you want to avoid criminal presecution in running your business?

A. Of course.

Q. If you were required to comply with that law, do you believe it would affect your ability to display books with pictures of nudity in it?

A. Yes.

Q. Do you believe it would affect your ability to display books with pictures of people engaged in some form of sexual conduct?

A. Yes.

Q. Do you believe it would affect your ability to display books that contained narrative descriptions of sexual conduct?

A. Yes.

Q. And do you believe that it would affect your ability to display books with narrative descriptions of nudity?

A. Yes.

Q. In your estimation, what percentage of your inventory would be included within this display provision?

A. A large percentage, maybe 30 to 50 percent.

Q. Would it include materials that are currently on the hard back and paperback best seller list?

A. Yes, definitely. Mainly fiction.

Q. Would it include books that fall within a category that I believe is referred to as romance?

A. Yes.

Q. Would it affect books that you have in your

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H.G. Ross - Direct

photography department?

A. Yes.

Q. In your art department?

A. Yes.

Q. In your health department?

A. Yes.

Q. In your--

MR. MCLEES: Your Honor, I would object for the record, unless this testimony is limited and there is an understanding this is being admitted just as her belief as to what this law would affect.

MR. PLOTKIN: No, she is relating it to that. She is testifying that this law would have that specific effect upon her business.

THE COURT: Well, your objection is overruled. It is a matter that you can explore on cross-examination.

MR. MCLEES: Very well, Your Honor.

THE COURT: Proceed.

Q. If you were forced to, if you had to comply with the display provisions that are contained in that Virginia law, have you given any consideration to the possible methods that you might explore in order to comply with the law?

A. Yes, we have certainly talked about them. And there doesn't seem to be any really viable way to comply totally with the law and to run the book store in a profitable manner.

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H.G. Ross - Direct

Q. What different alternatives have you considered?

A. Well, one of course is not letting anyone under 18 in the store.

Q. Let me just stop you there and ask you why you think that would not be

a viable option?

A. Well, I mean, first from what I have already mentioned, I think it is important for juveniles to be in book stores, to be looking at books, and that would upset me just from an ethical point of view.

Also, I mean, an awful lot of families come in with their children and you can't very well say, well, the adults can come in, but, you know, park your children out in the mall. And then I assume you would put a sign up that would say adults only, which would probably turn off most of the adults that came down to the Old Town area.

Q. You think that might change their perception of the character of your store?

A. I would think they would automatically assume it was a porno store, which of course it is not.

Q. Are there any other options that you gave any thought to?

A. Well, I suppose you could segregate an area of the store and pick carefully through those books, but you would be talking about then letting maybe the juveniles only go to the juvenile section, and then you would have to even be careful

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about young adult. I don't know how you would get them there so they didn't see the rest of the books that might be on display.

And also, I mean, there is an awful lot of young kids that do go to science fiction, which is, you know, an

iffy section too. Just general fiction, some literature that we have in our adult fiction section. It would be very, very hard to have just an adults only section that was totally separate from the rest of the store. It is just too mixed in with the rest of the content of the different sections.

Q. Would it also mean that you would have to review in a specific personal way each of the titles in your inventory?

A. Well, I suppose--

MR. MCLEES: Once again, Your Honor, I would object unless this is limited to her understanding or her belief of what she would have to do.

THE COURT: All right. With that condition, can you answer the question, Mrs. Ross?

THE WITNESS: Yes. From my understanding of the law, if I didn't knowingly realize that a book might have some harmful content in it, then maybe that wouldn't be a problem.

From just my general background of ten years in the book business, of course, there is an awful lot of books that I don't read that I could have a good idea might have some harmful comment in it. And again, as far as my estimates of

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H.G. Ross - Direct

what might be harmful to juveniles under this law, it is pretty much just based on my experience anyway, I don't know absolutely for sure which things would be considered harmful.

Q. Now, the answers to the questions that I am asking you here

today are based specifically upon your knowledge of your book store at that location and your experience there and at Brentano's, I guess?

A. Yes.

Q. Thank you.

THE COURT: And the way in which you perceive that this statute would affect your business?

THE WITNESS: Yes.

THE COURT: All right.

Q. I am sorry, I think we were talking about partitioning the store. I was going to ask you, assume that you could in some way segregate out these books. Would it require you or someone on your staff to personally go through and make determinations as to which books went where?

A. Yes. I think we would have to make determinations, plus I don't quite understand whether or not you could allow juveniles in any other section in your store. It probably requires somebody from the staff supervising that particular section too versus the rest of the sections of the store, which would be pretty costly.

Q. Okay. Would it interfere with your ability to hire

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H.G. Ross - Direct

part-time clerks or other people under the age of 18, do you think?

A. Yes. I would say that I could not hire anybody under the age of 18. Because just in the general course of events, just opening up books that come from the publishers, then they would be handling books that might be construed

to be against the statute.

Q. Okay. Are there any other methods that you have considered as potential ways for complying with the statute?

A. Well, cutting down on the inventory drastically I think again would pretty much make my book store unprofitable. If you have to cut off half of the best seller hard back and and paperback fiction list, it would be very hard to make a profit in a book store. It is hard anyway.

Q. Would that also again require you to go through and do almost a book by book review?

A. Yes. I would think that would be the best thing I would do as a citizen, trying to comply with the law as fully as possible.

Q. Any idea how long it might take somebody to review-- Let's say 10,000 titles, assume that you can maybe cut out the cooking books or gardening books?

A. Computer books.

Q. Or say 10,000 or 8,000 books, how long would it take someone to look through those to see if they had any

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descriptions of sexual content or nudity?

A. A long time. I can bearly estimate it.

Q. Any other options that you have considered in terms of complying with the statute?

A. Well, I would have to limit my buying very drastically also.

Q. Why is that?

A. Because, again, each publisher's list could very easily

contain a lot of books that could be considered against this law.

Q. On new books, do you have the opportunity to read all the books before you order them?

A. No, definitely not.

Q. And I take it you wouldn't have the time to do all that either?

A. No. And most of the sales representatives don't either. So, they might not even know.

Q. These are the publishers' sales representatives?

A. Yes, the publishers' sales representative.

Q. Now, in his brief the Attorney General suggested that store owners might be able to go around and place tags on books that are harmful to minors with a sign, with a note on it that

says, warning them not to peruse those books. Do you find this suggestion feasible?

A. I don't think so. First place, you would have to

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H.G. Ross - Direct

spend an awful lot of money and time again buying that number of tags and walking around and putting them in books. Plus the type of tag that you could use. I mean, it would have to be something that would stay in the book, that wouldn't fall out, that wouldn't hurt the book when you put it in the pages. And the other thing is that it would probably have to very clearly state why the tag was there. And it seems to me, again, that an awful lot of our customers would sort of recoil from

a book that said that it was an adult only book when it may be just something on health that it would have a description of sexuality or something in it.

Q. The Attorney General also suggested in his papers that stores could create a rack of adult only materials with a sign next to it that juveniles could not peruse this material. Would that be feasible in your store?

A. I would think that the way the law is written, it would be-- It is too broad to be able to do just one rack or even one half of the store practically, just segregating it would be just too difficult, too confusing.

Q. Because of the 30 to 50 percent of the inventory that would be involved?

A. You would have two health sections, to psych sections, two fiction sections, two poetry sections. It would be a very strange way of setting up a store.

MR. PLOTKIN: Your Honor, what I propose to do, and

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H.G. Ross - Direct

maybe to just save a little time, we have some books here that you--

THE COURT: You just state--

MR. PLOTKIN: I could just state them for the record and I could ask her a couple general questions.

THE COURT: And they will be received in evidence and given a designation.

Q. The first book is called American couples by Blumstein, B-l-u-m-s-t-e-i-n, and Schwartz,

S-c-h-w-a-r-t-z. Is this a book that you have removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this book located in?

A. Sociology.

Q. And in your review of this book do you believe that it contained narrative sexual descriptions that might run afoul of this amendment?

A. Yes.

Q. And therefore you would not be able to display this book in a place where minors could get it?

A. Correct.

Q. And there is, I would refer just for the records to pages 242 and 243. I don't think we need to read the material into the record, but just so that we have some specificity as to the

kinds of things we are talking about.

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H.G. Ross - Direct

Plainitffs' Exhibits 3 is a paperback book by Jackie Collins entitled Hollywood Wives. Is this a book that was removed from your store?

A. Yes.

Q. And what section was this located in?

A. Fiction.

Q. And to the best of your knowledge, was this book ever on the best seller list?

A. Yes.

Q. The New York Times best seller list?

A. Yes, it was.

Q. And I think in this book a reference to a page may be somewhat unnecessary, but I will give you 14 and

15 for the record.

Plaintiffs' Exhibit No. 4 is the Penguin Book of Love Poetry. Is this a book that you removed from your store for purposes of this hearing today?

A. Yes.

Q. And what section did this come from?

A. Poetry.

Q. And would you just describe for the record the cover of that book?

A. Well, the cover is from a painting definitely showing nudity in a woman.

Q. A man and a woman apparently embracing?

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H.G. Ross - Direct

A. I think it is supposed to be--

Q. Child?

A. A God. But, yes.

Q. And we would for the record mark pages 112, a poem by D.H. Lawrence, and page 107. Maybe some others.

Plaintiffs' Exhibit 5 is called the Diamond Waterfall, and it is written by Pamela Haines, H-a-i-n-e-s. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section was this in?

A. In romance.

Q. Okay. And let me just read the pages number out. Pages 44 and 45. And is there another reason why you selected that book as well?

A. Well, the cover does show nudity between a man and a woman.

Q. Plaintiffs' Exhibit 6 is a book entitled The Family Of Woman, edited by Jerry Mason. Is this a book that you

removed from your store to bring here today?

A. Yes.

Q. What section did this come from?

A. Photography.

Q. I would refer for the record-- Well, it is unnumbered, these pages are not numbered, I will let the book speak for

[45]

itself.

Plaintiffs' Exhibit 7 is a book entitled The New Our Bodies, Ourseleves by the Boston Women's Health Book Collective. Is this a book that you removed from your store for purposes of this hearing?

A. Yes.

Q. And what section did this come from?

A. Health.

Q. And is there, to the best of your recollection, is there a chapter in this book on sexuality?

A. Yes.

Q. And it has specific references to such things as birth control and masturbation?

A. Yes.

Q. Plaintiffs' Exhibit 8 is a book by John Updike, U-p-d-i-k-e, entitled the Witches of Eastwick, one word. Is this a book that you removed from your store for this hearing?

A. Yes.

Q. And what department did this come from?

A. Well, it is in fiction and best sellers.

Q. This is currently on the paperback best seller list?

A. I believe so.

Q. And I would refer the Court to 126 and 127 of that book.

If I might have one moment, I think I am just about

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done. We have no further questions of this witness.

THE COURT: Cross-examination?

MR. MCLEES: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Ross, my name is John McLees, I am from the Virginia Attorney General's Office. You mentioned on direct examination that your store displays books by subject matter?

A. Yes.

Q. And that's to help a customer find the type of book he wants?

A. Yes.

Q. Now, in your affidavit you mentioned that customers, particularly when they are buying or shopping for paperbacks, when they come into the store, they often don't know what specific book they want to buy, is that correct?

A. Yes.

Q. What they do often know is the type of book or the general subject matter?

A. That they like, yes.

Q. And you might have a section in your store on health, you have a section on health books?

A. Yes, we do.

Q. A section on philosophy and religion?

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H.G. Ross - Cross

A. Yes.

Q. History?

A. Yes.

Q. Biography?

A. Yes.

Q. Fiction books. Do you have a section on western novels?

A. They are mixed in with fiction.

Q. If see. How about gothic romance?

A. Romance is a section by itself, not gothic specifically.

Q. Do you have a section on science fiction and fantacy?

A. Yes.

Q. Do you have a section of sex books?

A. No.

Q. You do not. In fiction?

A. What do you consider a sex book?

Q. Well, books that are primarily sexually oriented?

A. Well, of course, see, that could be in health and stuff too. A fiction book that is primarily sexually oriented would be in fiction.

Q. Is it in a separate section?

A. No.

Q. Are they concentrated in one place?

A. Actually our books are arranged by author in fiction.

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H.G. Ross - Cross

Q. They are arranged by author in fiction?

A. Yes.

Q. I see. Do you arrange books by publisher?

A. No.

Q. Just by subject matter and--

A. Not very often.

Q. And then within the subject matter by author?

A. Well, all of our sections are arranged differently. In something like a fiction section or mystery or romance, it is pretty much straight by author. In home arts it would be by the type individual subject, whether it is carpentry or sowing or what have you.

Q. I see. Now, when you receive a book and unpack it and put it on the shelf, how do you determine what section to put it in?

A. Well, sometimes you know instantly just by looking at it by the title. Sometimes you have to look inside the fly leaf for a description of it or on the back of the book for a description of the content of the book. Or we have a card system where every title in our store is on a card, and the section that it should go in is labeled on that card. And if one of our employees is very confused, they can go to the publisher and find that card and figure out where to put it.

Q. Who prepares the cards?

A. Well, all employees prepare the cards.

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H.G. Ross - Cross

Q. In your store?

A. Yes.

Q. The employees in your store prepare the cards?

A. Yes.

Q. So, they review the books in order to prepare the cards?

A. No, they just look over the, whatever purchase order I have written or Peggy has written.

Q. They look over the purchase order in order to prepare the card?

A. Right. After I see a sales representative, we have a list of all the books with the numbers by it of what we bought, and they write up the card by publisher, title, price, author, quantity that we bought, when it is supposed to come out, et cetera, et cetera.

Q. I am not sure I understand. How do they know by looking at the purchase order what section to indicate on the

card that the book should be filed i?

A. If it is something confusing, we write it down.

THE COURT: But when you talk to the sales rep, or your manager, I would assume that there would be some dialogue on whether it is a western or a mystery or a romance, wouldn't it?

THE WITNESS: Yes. Quite often--

THE COURT: If it is Lamour, you know that is going to

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H.G. Ross - Cross

be a western, don't you? Or Ludlum, it is going to be a mystery?

THE WITNESS: Yes. Quite often when we are talking to the sales rep-- I mean, there is some books that I don't buy because there is no moral section to put in in and I can't see where to

display it. But most of the time if there is a question, I would ask them where they would best display it. And there are certain books of course that get in the wrong place. We always have fights over sociology versus history, but why--

Q. I can understand that, I think I would too. Isn't it fair to say that generally from looking at the book, looking at the fly leaf or the back cover, you can tell the subject matter of the book?

A. Yes, generally.

Q. And if you can't, can you talk to the publisher and find out what the general subject matter is?

A. Oh, sure. I can figure it out. I have certain employees that have trouble figuring it out.

Q. Now, you believe, correct me if I am wrong, but you believe that this law, this amendment that was passed, would prohibit you from displaying in your store books that contain a, either a narrative description of sexual conduct or a photograph depicting human nudity, is that correct?

A. Yes, the way I read the law.

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H.G. Ross - Cross

Q. Is that because that's what you believe harmful to juveniles, that's what your believe is harmful to juveniles?

A. Not necessarily my opinion.

Q. You don't believe that a picture, a photograph of human nudity is necessarily harmful to juveniles?

A. Not necessarily.

Q. And you don't believe that descriptions of sexual conduct are necessarily harmful to juveniles?

A. It could be

Q. But not necessarily?

A. Not necessarily.

Q. Some are and some aren't?

A. Well, right. Certainly some I would not sell to a juvenile.

Q. What books wouldn't you sell to a juvenile?

A. That is getting very specific. Certainly-- Well, there is a certain group of books that we get from Grove Press that are Victorian, pretty much old fashioned pornography.

Q. Is Venus In The Country by Anonymous?

A. I would definitely not sell that to a juvenile.

Q. You do sell that in your store though?

A. Yes.

Q. And is A Man With A Maid by Anonymous one of those books also?

A. Yes. I would say anybody by that famous author,

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Anonymous, I would not sell to juvenile.

Q. You do sell that in your store?

A. Yes.

Q. Where are they located in your store?

A. In the fiction section.

Q. How many different shelves are they on?

A. One, I think. It is about half of shelf.

Q. And is it fair to say by looking at the cover of A Man With A Maid and reading the back of the book

that you or I, I dare say anyone on your staff, could tell that this was a sexually oriented book?

A. Yes.

Q. And you wouldn't sell that to a juvenile?

A. No.

Q. That is because do you believe this is harmful to juvenile?

A. I would feel very uncomfortable having my nephews reading that, yes.

Q. Now, the books that Mr. Plotkin has read into the record and you referred to on direct examination, do you believe they are harmful to juveniles?

A. I don't think I would sell Jackie Collins to a juvenile. American Couples, they would never even try to buy. I mean, it is very hard. I really think that a lot of that depends upon

their parent. And I would leave many decisions of

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H.G. Ross - Cross

a lot of book up to the parents of the juveniles.

Q. So, in other words, you believe that there are some books that you can't really tell whether a juvenile should have them or not?

A. Right, especially not knowing the particular juvenile. And also, there are so many different ages of juveniles. I mean, if there is something that might be acceptable for a 17 year old to read that a nine year old shouldn't.

Q. And you believe that that decision should be left to the parents?

A. I think in general that that's the best. That's pretty hard to do, but, yes.

Q. Now, who told you about the provisions of this amendment and what it would mean for you? You mentioned the American Booksellers sent you some literature?

A. Well, I got a copy of the amendment from the American, and the original law from the American Booksellers Association.

Q. And did they send anything else with the law? I presume they sent you a letter a circular or something?

A. A letter and some previous record of cases in other states.

Q. Do you have that material with you?

A. Actually I think I might. It is back in my briefcase, I think, some of it is there.

Q. Could I be permitted to see it?.

A. Sure, if I can find it.

MR. PLOTKIN: Your Honor, I am going to, I would like to inquire as to the relevancy as to this line of questioning.

THE COURT: But the proper objection is that I don't allow discovery on an in-trial setting, and this is exactly what that is. So, if you object to it, I will order her to return it to you.

MR. PLOTKIN: I object.

THE COURT: Marshal, return it to counsel. But I do not permit discovery when I am presiding over an evidentiary hearing.

MR. MCLEES: I will withdraw that.

THE COURT: All right.

MR. MCLEES: Thank you, Mrs. Ross.

BY MR. MCLEES: (Continuing)

Q. Did the-- In addition to the material you received from American Booksellers, who else, if anyone, told you what this law would mean or told you that it would outlaw nudity and descriptions of sexual conduct?

A. Well, actually I read the law myself. I mean, some of it seems--

Q. You concluded that from reading the law that has been introduced into evidence?

A. Yeah. I mean, that's what it says, I think.

[55]

H.G. Ross - Cross

Q. What does it say about what is harmful to juveniles?

A. Well, of course that's one of the problems with the law in general, as

well as the amendment, is that that is extremely difficult to know what harmful to juveniles is.

Q. Do you now what the legal definition of harmful to juveniles is?

A. No.

Q. Has anyone read that to you?.

A. No. Is there one?

THE COURT: It is in paragraph six.

MR. MCLEES: That's correct.

Q. Did anyone read that to you?

A. A separate legal definition of harmful to juveniles?

Q. Yes.

A. No.

Q. No one ever told you that there was one, did they?

A. I don't know. Not that I remember. What is the legal definition?

Q. Mrs. Ross--

THE COURT: Don't waste my time on that. It is in the statute. And those are legal arguments. We are here now to fleshen out the record from an evidentiary standpoint.

Q. You believe, Mrs. Ross, that you would have to remove books of the type that you have referred to that you brought here today--

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H.G. Ross - Cross

A. I believe I would have to seriously consider it if I wanted to be in line with the law.

Q. And in addition to that, 30 to 50 percent I believe you said of your inventory you would be concerned with?

A. It would have to come under heavy scrutiny, yes.

Q. Do you believe that any of the books that you have brought today when

taken as a whole predominantly appeal to the prurient interest of juvenile?

A. Well, things like Our Bodies, Ourselves, the type of thing I have stopped teen-age kids from looking through, things like that, and pregnancy and child birth and things in the child care section just because of the pictures. I don't think they would probably pick up the Penguin Book of Love Poetry.

Q. The book, Our Bodies, Ourseleves and pregnancy and child birth, do you believe that they have scientific value or any other kind of value for juveniles?

A. Well, they have values for people in general that most juveniles are too young to get value out of them right at that time.

Q. Well, apart from very young juveniles, you believe that juveniles in general can get some scientific value from books like that?

A. Out of parts of them, yes.

Q. Are you aware that there has been a law on the books for years that makes it illegal for you to sell books to

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H.G. Ross - Cross

juveniles that are harmful to juveniles?

A. It is this law without the amendment.

Q. You are aware that that has been the law for years?

A. That that was the law, yes. I had not read it before, but I have now.

Q. And what-- And I assume you have been trying to comply with that law?

A. Well, except for I hadn't read it. But I certainly tried to comply with, I knew that there was a pornography law in the State of Virginia, and I tried to use good sense in complying with it. I never called for a copy of it.

Q. What books in your store have you refused to sell to juveniles?

A. Actually the matter has never arisen. The store seems to have an atmosphere that does not encourage juveniles to try to come up to buy books that might be really out of line for them to buy.

MR. MCLEES: Your Honor, I would move--

THE COURT: They will be received in evidence and marked as Defendants' Exhibits 1 and 2.

Marshal, hand them to the deputy clerk.

MR. MCLEES: I have nothing further.

THE COURT: Mrs. Ross, you may stand down. There is no need for any redirect on it.

NOTE: The witness stood down

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THE COURT: Call your next witness.

MR. PLOTKIN: As plaintiffs' next witness, Your Honor, we would call Mrs. Heather Florence.

THE COURT: Now, to what extent will this be cumulative of what you have already put on?

MR. PLOTKIN: I don't believe it will be cumulative at all, because this witness is not a book seller. She is someone involved from the publishing

end of it. And with the Court's permission, just in the, in our spirit of dividing up some of the work, I would ask the Court to allow Mr. Bamberger to conduct the examination.

THE COURT: Certainly, no problem.

NOTE: The witness is sworn.

HEATHER GRANT FLORENCE, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. BAMBERGER:

Q. Mrs. Florence, would you please state your full name for the Court.

A. Heather, H-e-a-t-h-e-r, middle name Grant, G-r-a-n-t, last name F-l-o-r-e-n-c-e.

Q. Where do you reside, Mrs. Florence?

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H.G. Florence - Direct

A. Connecticut.

Q. And what is your present occupation?

A. I am a vice-president and the general counsel of Bantam Books.

Q. Mrs. Florence, are you married?

A. Yes, I am.

Q. Do you have any children?

A. Yes, I do.

Q. How many and of what age and sex?

A. I have one son who is six-and-a-half, just started second grade.

Q. Would you please describe to the Court your education.

A. After completing public high school I went to Radcliffe College where I received a B.A., magna cum laude. And

then went to the Columbia Law School in New York and got a J.D. degree. That's the extent of it.

Q. When you completed law school, what did you do then?

A. I went into the private practice of law as an associate in the law firm in New York City of Weil, Gotshal and Manges. That was my first job.

Q. How long were you with that firm?

A. I was associated with that firm approximately five years.

Q. And what was your next business employment?

A. I went to another law firm in New York, Lankenau

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L-a-n-k-e-n-a-u, Kovner, K-o-v-n-e-r,

and Bickford, B-i-c-k-f-o-r-d, I was an associate and then became a member of the firm.

Q. And when you left that firm, what post did you then take?

A. I then went to Bantam Books as vice-president and general counsel.

Q. And you are presently employed by Bantam Books?

A. Yes.

Q. In what capacity?

A. I am still vice-president and general counsel. I have a few additional duties as well.

Q. Prior to your joining Bantam Books, in the practice of law did you work at all in the area of publishing?

A. Yes, I did.

Q. What was the nature of that practice?

A. Well, in addition to doing some work for individual publishers who were clients of the law firms I worked for, I also did work for the Association of American Publishers. I served as the counsel to the Freedom to Read Committee of that trade association.

Q. Do you know that the Association of American Publishers which you just mentioned is one of the plaintiffs in this action?

A. Yes, I do.

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H.G. Florence - Direct

Q. Is Bantam Books a member of that association?

A. Yes, it is.

Q. Would you describe your present duties with Bantam Books, please.

A. Well, in my capacity as the--

THE COURT: Counsel, this has been interesting, but you have about burned it out. Let's more on to the issues that are germane to this case immediately.

MR. BAMBERGER: Yes, Your Honor.

Q. Would you please describe to us the range and nature of material published by Bantam Books.

A. Bantam publishes books in a number of formats; hard cover recently, traditionally only paperback books. We publish all sizes of books, oversized, and most of our books are rack size, mass market, paperback books. We publish approximately 50 to 60 different titles every single month, comes out over three to 400 titles a year. And the range of subject matters and age levels is very extensive.

Q. Do you publish both original works and reprints of hard cover books?

A. Yes. Our paperback line is composed of reprints of hard cover books that we have published and that other publishers first published in hard cover, and also a number of books that are published for the first time in paperback which we call originals.

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H.G. Florence - Direct

Q. Approximately how many retail outlets stock publications of Bantam Books?

A. I think current estimates are probably close to 100,000 within the United States and Canada.

Q. Approximately how many of those would you classify as traditional book stores?

A. Well, it is hard to be precise. But a very small percentage, I would say maybe in the, I don't know 10, 20 percent range.

Q. What type of non-book store retail outlets stock publications of Bantam Books?

A. Our books are available for sale in pretty much every kind of retail outlet that has newspapers and magazines as well. In addition to others. We find our books in super markets, in airports, train stations, lobbies of many office buildings. Pretty much anyplace that candy and chewing gum are sold.

Q. Does Bantam Books sell directly to these non-book store retail outlets?

A. No. Our books are sold to those outlets predominantly through middlemen, wholesalers and jobbers.

Q. How do the middlemen choose the books for those retail outlets?

A. Well, we do have, Bantam has sales representatives who call on those

wholesale customers on a monthly basis and go over the Bantam list and try and persuade them to take as many

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of each title as they can.

Q. From the point of view of the publisher, what is the importance of display for a paperback book in terms of sales?

A. Well, it is really critical. More and more these outlets do show all of the books face out, if you notice, in any airport or similar-type rack. instead of just showing the spines of books, they show the face out. And in the selling process, our key tool that our sales people use is a copy of what we are going to use as the cover for the book. The sales representative solicit their orders three to four months before we actually ship the books. And what

they use as solicitation materials for every book is a copy of what the cover will look like to try and persuade the customer that in fact this will be attractive, it is likely to create attention at retail displays, and is likely then to sell through.

Q. So, we consider the display a critical ingredient of ultimately making the sale to the consumer, and we start pushing the attractiveness of the cover with the customer immediately.

Q. Do original paperback books generally receive notice in book reviews such as the Washington Post book section, for example?

A. They are very seldom reviewed. I am not that familiar, I am afraid, with the Washington Post. The New York Times book review devotes a fraction, about less than a page, to brief

mention of paperback books. Mostly they review only hard covers, and I think that is quite typical of most of the book reviews and also daily reviews.

Q. So, how do the prospective reviewers find out about original paperbacks that you publish?

A. They see them on display where they go to work, where they ride trains, where they get on buses.

Q. In your capacity as advisor to your employer, Bantam Books, is one of your functions to advise them with respect to legal problems which may arise out of manuscripts which are proposed to be published?

A. Yes.

Q. If I could hand the witness a copy of Exhibit 1, if I may. And I would like also to hand up to the

witness the definition of harmful to minors which is not in the amendment.

THE COURT: You mean section six, harmful to juveniles?

MR. BAMBERGER: Harmful to juveniles, yes.

THE COURT: Well, just ask her a question and let's see. I have a copy of it in front of me.

Q. Mrs. Florence, have you had a chance prior to this time to review the amendment to the Virginia statute?

A. Yes, I have.

Q. Which is at issue in this case?

A. Yes, I have.

Q. In your capacity as advisor to your employer, could

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H.G. Florence - Direct

you apply that standard to manuscripts coming into Bantam Books and advise them

whether or not the books could be freely sold, freely displayed in the Commonwealth of Virginia?

MR. MCLEES: Objection, Your Honor, relevancy.

THE COURT: The objection is overruled.

A. Well, I would find it virtually impossible to do that apart from perhaps using an educated or knowledgeable guess as to what would fall within the statute, which is difficult. It would be a monumental task. It would really require reading probably 90 percent of the fiction titles that come through the house, and probably about 25 percent of the nonfiction titles. And it would be virtually impossible to get that much work done in my department.

Mr. BAMBERGER: I have no further questions.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Florence, since you advice your employer on First Amendment issues, I presume you are aware that there, there is and has been for several years in Virginia a law prohibiting the sale to juveniles of materials that are harmful to juveniles?

A. I am aware that such a law exists in many states. And

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H.G. Florence - Cross

I was not particularly aware that there was one in Virginia, but I am aware that those laws exist, and our books are

distributed nationwide. So, for all intents and purposes, yes.

Q. And you are aware that the same definition of harmful to juveniles that counsel showed you a few minutes ago is the definition that is used in Virginia and many other states?

A. It is.

Q. In those laws forbidding the sale of materials of that sort to juveniles?

A. Yes.

Q. And I am sure in your duties you have advised your employer concerning what books can be sold to juveniles, haven't you?

A. Actually I have never had the need to since my employer is not in the retail end of the business. And the only books that are clearly directed to a juvenile audience, we do have a large

young reader publishing program, would, based on the editorial selection of that material, not contain matter which is defined as harmful to juveniles. So, it has never arisen for me.

Q. So, the matter has never arisen. Your employer doesn't make a practice then of advising retailers that buy Bantam Books what books can be sold to juveniles or not?

A. It is certainly not our practice from a legal standpoint. I believe that when our sales representatives

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pitch the list, they try and be as clear as they can to the prospective customer as to who the likely audience is and who might want to read the book.

Q. Do they tell them that it can be sold to juveniles or it can't?

A. I imagine that does not come up in discussion.

MR. MCLEES: Very well. Nothing further, Your Honor.

THE COURT: Fine. Thank you, Mrs. Florence, you may stand down.

NOTE: The witness stood down.

THE COURT: Call your next witness.

MR. PLOTKIN: At this time, Your Honor, I would like to call Carol Johnson.

THE COURT: Come forward, Mrs. Johnson.

NOTE: The witness is sworn.

MR. PLOTKIN: Your Honor, again in the interests of expediency, I will try to tailor this to material that is unique to Mrs. Johnson. I will try to

avoid, to the extent I can, some of the corroborative or the cumulative nature of the prior testimony. And I am afraid a little of it--

THE COURT: She has heard most of it, so if you want to ask a question that embraces things that she has heard and have her then endorse it, I will permit that.

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C. JOHNSON - Direct

CAROL JOHNSON, a witness called by counsel for the plaintiffs, first being duly sworn, testifies and states:

DIRECT EXAMINATION

BY MR. PLOTKIN:

Q. Would you state your name and address for the record, please.

A. Carol Johnson. I live in Arlington, Virginia.

Q. Are you one of the named plaintiffs in this lawsuit?

A. Yes, I am.

Q. How long have you lived in Arlington?

A. 17 years.

Q. Are you married?

A. Yes.

Q. Do you have children?

A. Yes.

Q. How many?

A. Two, in the Arlington school system.

Q. And their ages?

A. Almost 12 nd almost 16.

Q. And what is your present occupation?

A. I am owner/manager of Books Unlimited in Arlington, Virginia.

THE COURT: Of which?

THE WITNESS: Books Unlimited.

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C. Johnson - Direct

Q. Mrs. Johnson, you might want to lean forward a little bit because we are having a little difficulty picking up your voice.

A. How is that?

Q. Fine. How long have you owned Books Unlimited?

A. Ten years.

Q. And are you a member of the American Booksellers Association?

A. Yes, I am.

Q. Would you describe the geographic location of your store.

A. We are located in the Clarendon section of Arlington. Clarendon was the original central business district in Arlington, and it is now under a great deal of reorganization and redevelopment. It is a very interesting neighborhood. We have a lot of ethnic restaurants. We

have a wonderful baby furniture store next door, a big Sears across the street. A nice neighborhood directly behind us. We have a park three blocks away. We have a large elementary school six blocks away. We have a lot of walk-in traffic.

Q. Okay. Would you describe the size and the physical layout of your store.

A. About 1200 square feet of selling space, 150 to 200 in the back room. It is very long and narrow. As you walk in the front door, there are two alcoves directly behind you, they

have big picture windows that are visible from the street. The rest of the layout of the store, there are floor to ceiling book shelves as you walk down, with a central counter. And then

about half way down the store there are little like library stacks, and then more floor to ceiling shelving in the back.

Q. And would you describe for the Court the way your inventory is organized.

A. By subject matter. And then as a general rule, in alphabetical order by author within the subject matter, except where it doesn't fit.

Q. And you heard Mrs. Ross testify earlier about her store was organized into different subject materials?

A. Right.

Q. And so forth. Would you generally adopt that--

A. Everybody has their own system, but we have mental health, parenting, biography, history, best seller, new releases, science fiction, everything.

Q. Okay, thank you. Is you store open to minors?

A. Absolutely.

Q. What percent of your sales occur in your children and young adult books?

A. 40 percent of our sales annually are from the children's section.

Q. And what percentage of your inventory would you

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C. Johnson - Direct

consider to be in your children's section?

A. Percentage of inventory? It is 40 percent, the figure is from the same source.

Q. Okay. Do you encourage persons under 18 to enter your store?

A. Absolutely.

Q. Why?

A. Well, it is very important to us. My original partner and I would have opened a children's store if we hadn't had such a broad base in books ourselves. My whole background is in working with children, and we wanted to have a store that would offer things that we couldn't find in other stores around the area. We don't just sell children's books, we sell children's records, we sell toys, we sell games, puzzles, all sorts of things pertaining to children.

Q. Did you try any special measures to promote your store as a children's book store even though you don't call it a children's book store?

A. Absolutely. We do about 25 school bookfairs a year. Some of them are public elementary schools, some are private, some are preschools. We also

do special interest bookfairs. We do, I do story telling in the stores sometime. I have told stories on public television on cable, I mean, not on public television. We also, I have a member of my staff who gives lectures on special children's subjects to a lot of preschools

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C. Johnson - Direct

and some elementary schools.

Q. Do you have a special section for young adults?

A. Yes, I do, a large one.

Q. Why?

A. My children are older now and I am interested in young adult literature more so than I was when I first got started. There is a lot of really good literature.

Q. I take it in the store where you are located, you don't lump all the children's books in one section?

A. No. It is a very large section, so that I have divided it up.

Q. What types of books are located in the young adult section?

A. In the young adult section it is almost entirely fiction. We figure that by the time the children are designated as young adults, they pretty much have the run of the store for nonfiction items.

Q. What age would you think of as being young adults for purposes of that?

A. 12 up, 12 to 18.

Q. Are there, in the books that are contained in the young adult sections, are there references in some of those books to sexual conduct?

A. Yes, there are.

Q. Are there references or are there pictures of nudity,

human nudity in those books?

A. No, not in those books, no pictures.

Q. Do you have a section on science fiction?

A. Yes.

Q. Are those books popular with young readers?

A. Very.

Q. Do some of the science fiction titles contain narative descriptions of sexual conduct?

A. Absolutely.

Q. Do you carry books known as best sellers?

A. Yes.

Q. And do any of those books contain discussions of sexual conduct?

A. As far as I know, yes.

Q. And you have a section on mystery and suspense?

A. Yes.

Q. Do those books contain discussions--

A. Yes.

Q. Have you ever refused to sell a book to a juvenile?

A. Yes.

Q. Why?

A. Mainly because I thought they were too young for the material that they brought up to the counter. Several times I have refused to sell Judy Blume Forever without a note from their parents.

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C. Johnson - Direct

Q. And that is a decision-- How would you make a decision as to whether or not to sell a particular book to a particular individual?

A. Arbitrarily. I am a parent, and I would just make that decision as a parent.

Q. And would you make that in the context of somebody coming forward to the counter and handing you a book that they wanted to purchase?

A. Yes. I even refused to sell Forever to her parent because I thought her child was too young, and she wrote me a letter of thanks afterwards.

Q. Who selects the books for your inventory?

A. I do 90 to 95 percent of my buying.

Q. How many titles do you have in your inventory?

A. 15 to 20,000.

Q. Do you employ any people under the age of 18 as did Mrs. Ross?

A. Yes.

Q. And would they conduct the similar kinds of duties that she described?

A. They do everything, yeah, I mean everything but buy and make any kind of financial decisions, yes. It is a small store, they have to pull their weight.

Q. I take it like Mrs. Ross you display books in your store?

[75]

C. Johnson - Direct

A. Yes.

Q. How do you display them, what methods do you use?

A. Because I have a small space and so many titles, some of the books are face out, many more of them are spine out. But they are available, as many as I can, at eye level, and the rest within easy reach of the hand all along the shelves.

Q. Why is that important?

A. Sometimes there is only one of us manning the store, but even when there are three of us, we are very likely to be busy with customers or the telephone or the cash register. And so, for practical purposes it is necessary for customers to do their own shopping. Plus they pick up things, you know, that we wouldn't imagine they are interested in if they are just allowed to wonder around.

Q. Did there come a time when you learned that Virginia had passed a law that might impact upon your ability to display certain books?

A. Yes.

Q. When was that and how did you come to find out about it?

A. It was the week before it went into effect, and I was contacted by the

media coalition from the ABA. But I knew it was coming since I had been reading about it.

Q. Have you since had an opportunity to read the law?

A. Yes.

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C. Johnson - Direct

Q. If you were required to comply with the law, would it have any impact on your ability to display books in your store?

A. I think it would have a tremendous impact.

Q. Why?

A. Because so much of my business is done with juveniles. Because I have, I have classes coming into my stores as a field trip from schools. And if I was worried about what I have on the shelf, I would have to say that they couldn't do that anymore.

Q. Can you estimate for the Court what percentage of your inventory might fall within the purview of the display requirements?

A. It would be less than Helen's because so much of it is children's, but I would think that maybe up to 30 percent.

Q. Do you know that it is a crime to violate the display provisions?

A. Yes.

Q. Have you ever been convicted of a crime?

A. No.

Q. If you were forced to comply with these display provisions, what options might be available to you? I take it you heard Mrs. Ross testify about the options that she had available. Do you think it might require you to remove books from--

A. I do. And I think it would require me to greatly

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tailor the way that I buy new books.

Q. In what sense?

A. Well, not all the books that you buy come from a publisher representatives' sales pitch. A lot of them just come from picking things up off of lists. And it is very difficult from reading a list to know what the contents of a book is, and you would really just have to leave out everything you couldn't ask questions about.

Q. Would it be possible for you to go around and put special tags on the books that you thought might be potentially covered by this law?

A. It would be very difficult to know which books to put tags on. Where I had an inkling, I would hate to pull,

I would hate for the people to think that I have adults only books in my stores since they think of it as a family neighborhood book store.

Q. I take it, however, you do have some books that you would consider, certainly consider as being for adults only?

A. Yes, certainly.

Q. Do you have some of those Anonymous books that are referred to?

A. Yes.

Q. By the way, are the all Anonymous books grouped together?

A. Yes.

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C. Johnson - Direct

Q. Is that because the author's first name begins with A?

A. That's not why. Some of them have real authors.

Q. Do you believe that the removal, if you had to remove any books from your store or restricted your buying of titles, that would put you at any competitive disadvantage?

A. Absolutely.

Q. Why?

A. It is hard enough to compete as an independent book seller with the likes of Crown, and they operate area wide. So that if they had to comply with the law in Virginia, they wouldn't have to comply with it in the District and Maryland. That alone is difficult. And then we would have to be competing with other book stores in the District and Maryland who didn't have to comply with the law. We would have to pull best sellers and they wouldn't have to.

Q. I have some books here that we removed, that you removed from the

shelves of your book store, is that correct?

A. Yes.

Q. Each of these are books that are on display in your store?

A. Yes.

Q. Plaintiffs' Exhibit 9 is a book called Am I Normal, by Jeanne Betancourt, B-e-t-a-n-c-o-u-r-t, an illustrated guide to your changing body. Why do you think this book, you would not be permitted to display this book?

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C. Johnson - Direct

A. It shows male nudity.

Q. And is this a book that is specifically designed for adolescents--

A. 12 to 14 year olds, yes.

Q. Plaintiffs' Exhibit 10 is entitled Changing Bodies, Changing

Lives, by Ruth Bell and others. Do you believe that you would have some restrictions on your ability to display this book?

A. Yes, I do.

Q. Why?

A. Well, aside from pictures of nudity in there, there a great deal of sexual description on puberty and teenage sex.

Q. Is this a book again designed primarily for adolescent readers?

A. Yes.

Q. Plaintiffs' Exhibit 11 I think you have alluded to this earlier, it is entitled Forever, by Judy Blume, B-l-u-m-e. Is this a book that you feel you might be prohibited from displaying?

A. Absolutely.

Q. Why?

A. There is quite graphic descriptions of first sexual encounter in the book.

Q. And again, what audience is this book targeted at?

A. Young adults, I would say 14 and up.

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C. Johnson - Direct

Q. Lord Foul's Bane by Stephen R. Donaldson, Plaintiffs' Exhibit 12. Why do you--

A. There is a graphic description of rape in it that is crucial-- It is a series of 2,000 pages, it is six books, very popular science fiction.

Q. Plaintiffs' Exhibit 13, entitled Lucifer's Hammer by Larry Niven and Jerry Pournelle, P-o-u-r-n-e-l-l-e. Why do you think you would be restricted from displaying this book?

A. Again, there is sexual content.

Q. And would that be on pages 66 and 67?

A. I think so, yes.

Q. Tender Is The Storm by Johanna Lindsey, Plaintiffs' Exhibit 14. Why--

A. That's because of the cover.

Q. I am sorry, what about the cover?

A. It is male nudity again, rather graphic.

Q. Plaintiffs' Exhibit 15, The Facts of Love by Alex Comfort and Jane Comfort. Why do you think you would have restrictions--

A. Again descriptions of the sexual act as well as pictures. Nudity.

Q. And again, what audience is this book targetted for?

A. Young adults.

Q. Plaintiffs' Exhibit 17, Where Do Babies Come From by Margaret Sheffield, S-h-e-f-f-i-e-l-d. Why do you think that

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C. Johnson - Direct

you would have trouble displaying this?

A. There are fairly graphic pictures in there. They are lyrically done, but they are fairly graphic.

Q. Do you believe that some of the material that we have just reviewed here are appropriate for older teen-agers, but yet might be harmful for younger children?

A. Yes, I do.

Q. Why?

A. Well, younger kids are just not ready for the information that is involved. Most of the narrative information, the pictures they are just

going to titter over, but I think some of the naratives they are just not ready for that kind of information yet. And it is a decision their parents should make with them.

Q. Do you believe that each one of these books or any of these books are necessarily harmful to juveniles?

A. I do not. But someone else might.

Q. And why is it that you would then consider them to be covered by these display provisions?

A. Just because I don't know who's definition of harmful I am to use. And to be safe, I would have to pull them.

MR. PLOTKIN: I have no further questions of this witness.

THE COURT: Cross-examination, Mr. McLees?

MR. MCLEES: Thank you, Your Honor.

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CROSS-EXAMINATION

BY MR. MCLEES:

Q. Mrs. Johnson, do I understand correctly that you believe that this law, this amendment that we are here about, would prohibit you from displaying in your store any book that has a verbal description of sexual conduct or contains a photograph or a picture of human nudity?

A. Pretty much.

Q. Is that correct?

A. Yeah.

Q. Who told you that?

A. I read the law.

Q. Did you read the definition of harmful to juveniles?

A. No, that was not included in--

Q. It wasn't included in the material that was sent to you?

A. I don't believe so.

Q. Did you know there was a legal definition of harmful to juveniles?

A. No. I mean-- Yes, I guess I assumed there was, but I hadn't read it.

Q. But you didn't know what it was?

A. No.

Q. Now, you have mentioned a figure I believe that you gave was maybe 30 percent of your inventory would be affected

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C. Johnson - Cross

by this law?

A. Possibly.

Q. And that's because-- Do you believe that 30 percent of your inventory is harmful to juveniles?

A. I said up to 30 percent.

Q. Do you believe up to 30 percent?

A. No.

Q. You don't believe it is harmful?

A. No.

Q. But it is your belief that it might come under this law?

A. Sure.

Q. Who do you think under this law will determine what is harmful to juveniles?

A. I would assume it would be the public if there were a complaint, then someone might follow-up on it.

Q. What would happen in your understanding if they followed up on it?

A. I suppose I could be taken to court.

Q. Are you aware that before you could be charged with a violation of this law, a neutral judicial officer would have to find that there was probable cause to believe that the book in question met the legal definition of harmful to juveniles?

A. No, I was not aware of that.

Q. Are you aware that before you could be convicted of

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C. Johnson - Cross

violating this law, you would have a right to have a jury of 12 ordinary people from your community decide whether they were convinced beyond a reasonable doubt that the material that was sold was harmful to juveniles under the legal definition?

A. No.

Q. You were not aware of that?

A. Not explicitly aware, no.

Q. What percentage of your inventory predominantly appeals to the prurient interests of juveniles?

A. Well, I would have no idea.

Q. A large percentage, a small percentage?

A. Probably a very small percentage. Every once in awhile I have to take a book out of the hands of someone, but a very small percentage.

Q. What books do you take out of the hands of someone?

A. The Joy of Sex mostly.

Q. And whose hands do you take that out of?

A. Juveniles.

Q. I see. In your store?

A. Sure.

Q. If they pick it up and peruse it?

A. Yes. Mostly my own children back when I first started, but others included, Yes.

Q. Now, what about The Gardens of the Night by Anonymous? You sell that in your store, don't you?

A. No, probably not. I don't keep real close track of those titles.

Q. You do sell books by Anonymous published by Grove Press, don't you?

A. Some of them, sure.

Q. Comparable to this?

A. Comparable.

Q. What about Venus Unbound by Anonymous, you do sell that, don't you?

A. Maybe, possibly.

Q. That's also Grove Press, Anonymous, and you sell books comparable?

A. Some of them, yes.

Q. Do you sell them to juveniles?

A. No.

Q. If juveniles come into your store and pick those up and leaf through them and read them, do you allow them to do that?

A. It has never happened, to my knowledge.

Q. Where are they displayed in the store?

A. In with the books on sex, with the books on sex education.

Q. Do you consider that to be sex education?

A. No, but I keep them away from fiction so that I can keep an eye on them.

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C. Johnson - Cross

Q. What do you consider these Grove Press Anonymous books to be if they are not sex education?

A. Fantasy material.

Q. Now, the books that Mr. Plotkin referred to and that you have brought here today, do you believe they are harmful to juveniles?

A. I believe someone could say that they were, could feel that they were, yes.

Q. Well, let's not, let's not talk about what someone could say. Let's talk about your belief about these books. Do you believe that Where Do Babies Come From by Margaret Sheffield, do you agree that that is lacking in serious literary or artistic or political or scientific value for juveniles?

A. No.

Q. What about The Facts of Love, do you believe that is lacking in serious literary or scientific value for juveniles?

MR. PLOTKIN: I would like to inquire as to what age group we are talking about.

THE COURT: Young adults. Do you want to plug that in, because that is the audience that we are basically talking about.

THE WITNESS: Well, there are even younger children.

MR. MCLEES: Your Honor, it would be our position that legally that is irrelevant.

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C. Johnson - Cross

THE COURT: All right.

Q. What about Changing Bodies, Changing Lives. Do you believe that that is lacking, taken as a whole, lacking in serious literary or scientific value for children?

A. I do not believe that. But I think that it could be harmful to certain children.

Q. It could be harmful, you believe it could be harmful to certain children?

A. Sure.

Q. But you don't believe it is lacking in serious scientific value for children?

A. No.

Q. Now, you mentioned Lord Foul's Bane, I believe that is one of these books also?

A. Yes.

Q. That's a series of six books?

A. Yes, six.

Q. And it has a total of 2,000 pages.

A. Yes. I read it.

Q. And do you sell that to children?

A. I use a lot of judgment with that, because of the rape in the first book.

Q. Now, this rape in the first book is the reason that you feel that under this law you wouldn't be able to display that book?

A. Yes.

Q. How many pages doe that rape take up?

A. I don't remember.

Q. Two or three?

A. Maybe longer.

Q. More than ten?

A. Maybe not.

Q. Probably not. More than 15?

A. Around that, probably.

Q. Out of 2,000 pages? Could you give a verbal response please for the benefit of the court reporter?

A. Yes.

Q. You mentioned Judy Blume's book Forever, that you didn't sell that to juveniles, is that right?

A. Well no, what is the definition of juveniles? I do sell it to young adults.

THE COURT: Anyone under 18 as I read the statute.

THE WITNESS: Of course I sell that to juveniles, but I don't sell it to anyone who I think is too immature to read it.

Q. Why?

A. That's the parent in me, I don't think they are ready.

Q. Well, what is it about that book that they are not ready for?

Q. There is quite a lot of graphic sexual description

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C. Johnson - Cross

that seems appropriate for young adults, it is about making choices.

Q. About making choices about sexual conduct?

A. Yes.

Q. Now, when you make a decision like that that you could sell a book like that to one person under 18 but not to another given person under 18, what factors do you take into consideration?

MR. PLOTKIN: I would just like to object to this line of questioning, for one basic reason. The questions are all about whether or not these books would be sold. And we are not here challenging the sale, the fact that Virginia has decided to make illegal the sale of certain kinds of books. What we are really concerned about here is whether or not these books can be displayed in a place where children can come in.

THE COURT: And where the majority of your customers are adult.

MR. PLOTKIN: And these questions about whether or not she would sell a particular book are interesting,

but they don't really go to whether or not they can be displayed in an area where children can see them.

THE COURT: The objection is sustained.

MR. MCLEES: Well, Your Honor, may I respond to that?

THE COURT: Yes.

MR. MCLEES: The objection that counsel makes is

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C. Johnson - Cross

interesting in itself because it points up one of the basic flaws in their case. And that is that the same criteria, the harmful to juveniles criteria, have been on the books for years forbidding the sale of--

THE COURT: The sale, right. But their complaint is that you have the overbreadth of this, that you can't

display things to an adult audience realizing that you would never sell them to a juvenile.

MR. MCLEES: Our point at this point, Your Honor, is that we are getting at what books the store owner actually perceives are harmful to juveniles and what books they believe should not be, should not be accessible to juveniles.

The criterion is the same whether it is sold or whether it is displayed under the law. They are under the impression that there is going to be some new criterion, and they have talked about I think these books would be affected by the law. The point is, these books are not going to be affected by the law.

THE COURT: Well, I mean, that assumes that every sheriff and law

enforcement person in the State of Virginia shares a common set of values and that they will ignore the displaying of these fairly sexually explicit books where juveniles can see them.

MR. PLOTKIN: Your Honor, if I might just make one additional point in response to what Mr. McLees has said. I

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C. Johnson - Cross

think there is a another fundamental difference that occurs in a sale situation as opposed to a display situation, and that is in a sale situation you have in front of you a particular book and a particular child. The book seller--

THE COURT: That is true.

MR. PLOTKIN: The book seller can make that judgment right then and there. In the display situation, the

offense of displaying, if you will, of displaying this book occurs before any juveniles walks into the store.

THE COURT: The display is having a racey sort of a title on the spine of the book that he can't see anything except the title which excites him and he grabs it up and starts looking at it, and then the cats out of the bag and off to jail you go.

MR. PLOTKIN: Thank you, Your Honor.

MR. MCLEES: Your Honor, to get back to the question that I asked, which was pertaining to what criterion she takes into consideration in deciding what books are suitable for juveniles and what are not, what I am getting at with that point, in that specific question is that they have raised the idea that books may be suitable for some

juveniles and not for others, therefore this law is overbroad, it is vague. What we want to get out is the criteria she would apply in deciding what juveniles, a book is suitable for and what juveniles it is not suitable for. It is not just going to be age, it is going

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C. Johnson - Cross

to be other things in addition to that. They would have the law specify a different criteria for each, for each level of juveniles, age or maturity.

THE COURT: Well, I mean, your statute is all encompassing. A juvenile under 18 is a juvenile. They don't differentiate between young adults or anybody else.

MR. MCLEES: That's exactly our point, Your Honor. The point is that it

would be impossible to do so with the sort of precision that they contend that the Constitution requires. And that's what I am going to point up with this witness, because--

THE COURT: But here again, that is a matter of legal argument at the conclusion of the case, and I don't see where it has any evidentiary significance at all. But I sustain the objection. And now that we have it out of our system, let's move on to something else.

MR. MCLEES: Very well, Your Honor.

BY MR. MCLEES: (Continuing)

Q. You mentioned that you have some books you regard as adults only books?

A. Those few Anonymous, yes.

Q. Are those the only ones?

A. Almost, yes.

Q. What percentage of your inventory do they constitute?

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C. Johnson - Cross

A. I have no idea. A tenth of a percent. Half a shelf.

Q. Are you aware that there has been a law on the books for several years making it legal to sell certain books to juveniles?

A. Yes.

Q. Sexually oriented?

A. Right.

Q. And you have tried to comply with that law?

A. Certainly.

Q. Have you ever been arrested for violating that law?

A. No.

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MR. MCLEES: Thank you, nothing further.

MR. PLOTKIN: No further questions, Your Honor.

NO. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

1. Does Plaintiffs' failure to allege and show that they displayed any material in violation of Virginia's 1985 juvenile display provision deprive a federal court of Article III jurisdiction?

2. Given the contrived nature of Plaintiffs' preemptive attack on Virginia's statute and the paucity of their evidence, do federal-state comity concerns outweigh any interest in allowing Plaintiffs to litigate the legal rights and interests of others not before the Court?

3. Should Virginia's 1985 juvenile display provision be totally and absolutely invalidated even though it is not substantially overbroad on its face and is readily susceptible to narrowing constructions if necessary?

PARTIES BELOW

The appellants in the court of appeals were the Commonwealth of Virginia by her Attorney General and William K. Stover, Chief of Police for Arlington County, Virginia. The appellees were the American Booksellers Association, Inc., the Association of American Publishers, the National Association of College Stores, Inc., Books Unlimited, Inc., of Arlington, Virginia and Ampersand Books of Alexandria, Virginia.

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NO. 86-1034

IN THE

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OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The district court's opinion is reported at 617 F. Supp. 699 and appears in the Jurisdictional Statement Appendix at pages A-15 through A-30. (J.S. at A-15 to A-30). The corrected modified panel opinion of the Court of Appeals is reported at 802 F.2d 691 and appears at pages A-1 through A-12 of the Jurisdictional Statement Appendix. (J.S. at A-1 to A-12).

JURISDICTION

The Court of Appeals' modified opinion was rendered on September 30, 1986. Virginia filed her notice of appeal on October 9, 1986, and her Jurisdictional Statement on December 24, 1986. This Court noted probable jurisdiction on February 23, 1987. ___ U.S. ___, 107 S.Ct. 1281. The Court's jurisdiction rests upon 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, of the United States Constitution states in pertinent part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution. . . ."

2. The First Amendment to the United States Constitution states in pertinent part: "Congress shall make no law ... abridging the freedom of speech." The Fifth and Fourteenth Amendments to the United States Constitution state in pertinent parts:"No person shall be . . . deprived of life, liberty, or property, without due process of law."

3. The relevant federal statutes are 28 U.S.C. § 2201 and § 2202, commonly called the declaratory judgment statutes, and 42 U.S.C. § 1983. (J.S. at A-41).

4. The relevant Virginia statutes are § § 18.2-390 and 391 of the Code of Virginia. They read, with the pertinent 1985 amendment to § 18.2-391 emphasized, as follows:

Virginia Code § 18.2-390

Definitions.—As used in this article:

(1) "Juvenile" means a person less then eighteen years of age.

(2) "Nudity" means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

(3) "Sexual conduct" means actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse, or physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or, if such be female, breast.

(4) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) "Sadomasochistic abuse" means actual or explicitly simulated flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) "Harmful to juveniles" means that qualilty of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.

* * *

Virginia Code § 18.2-391

Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:*

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

(b) It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

(c) It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection (a) or subsection (b) hereof, or to his agent, that such juvenile is eighteen years of age or older, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture show or other presentation, as set forth in subsection (b).

(d) It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection (a) or subsection (b) hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is eighteen years of age, with the intent to procure any material set forth in subsection (a), or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection (b).

(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor.

STATEMENT OF THE CASE

The American Booksellers Association and its fellow plaintiffs ("the Plaintiffs") challenge *in toto* the 1985 amendment to § 18.2-391 of the Code of Virginia ("the Amendment"). The Amendment makes it unlawful to knowingly display for commercial purposes pornography that is obscene for children, but not adults, where children can examine and peruse it. The material covered by the Amendment is precisely the same material whose sale to juveniles has for years been proscribed by the pre-existing statute.

Virginia's display provision became law on July 1, 1985. Two weeks later, an array of trade associations, bookstores and individuals filed a complaint in the United States District Court for the Eastern District of Virginia attacking its constitutionality. The plaintiffs named Charles T. Strobel, Director of Public Safety for the City of Alexandria, and William K. Stover, Chief of Police for Arlington County, as defendants; neither Strobel, Stover nor any other official in the Commonwealth of Virginia had taken any steps to enforce the Amendment.

The suit was based on 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202 and the First, Fifth and Fourteenth Amendments to the United States Constitution. The Plaintiffs asked for a declaratory judgment that the Amendment was unconstitutional and sought injunctive relief. (J.A. 12-22). The Plaintiffs filed three affidavits in support of their complaint: the affiants were Helen G. Ross, who operates Ampersand Books in Alexandria, Virginia, Carol Johnson, who manages Books Unlimited, Inc. in Arlington, Virginia, and Heather Florence, Vice President and General Counsel of Bantam Books, from Connecticut. (J.A.23-32).

Finding that the complaint called into question the constitutionality of a State statute affecting the public interest, the district court ordered that the Attorney General of Virginia be given the opportunity to intervene on behalf of the Commonwealth of Virginia pursuant to 28 U.S.C. § 2403(b). (J.S. at A-34). The Attorney General of Virginia accepted the court's invitation and intervened in the action on July 26, 1985. (J.S. at A-36).

After briefing the issues presented, the parties appeared before the district judge to argue the defendants' motions to dismiss the complaint. Over Virginia's objection, the district court allowed Ross, Johnson and Florence to supplement their affidavits orally. Their testimony included Ross' statement that she did not know Virginia's definition of "harmful to juveniles," having never read the applicable definitional statute that had been Virginia law for years. (J.A. 56). She had never refused to sell a book to a juvenile because "the matter has never arisen." (J.A. 58).

Heather Florence testified that she was a Connecticut resident and, before the Plaintiffs' complaint was filed, was not aware that Virginia even had a "harmful to juveniles" law. (J.A. 61-62). She had never considered whether material was "harmful to juveniles" because her employer does not retail books. (J.A. 62). Florence could not say which material would be affected by the Amendment because she did not understand what "harmful to juveniles" meant under Virginia law. (J.A. 61).

Carol Johnson testified that she "arbitrarily" decides whether to sell a particular book to a juvenile. (J.A. 67-68). Johnson did not know there was a legal definition of "harmful to juveniles" under Virginia law: "I guess I assumed there was, but I hadn't read it." (J.A. 75). She had no idea what percentage of her inventory appealed predominantly to the prurient interest of juveniles: "[E]ven guessing, it would be a very small percentage." (J.A. 77).

The district court rendered its judgment and opinion on September 10, 1985. The court found that an actual case or controversy existed and that it should not abstain from adjudicating the case because it involved a First Amendment issue with no unclear question of State law. The court proceeded to hold that the Amendment was overbroad on its face and that it was not a valid time, place and manner restriction. Defendants Strobel and Stover were accordingly permanently enjoined from enforcing the Amendment that they had never even contemplated enforcing. *American Booksellers Association v. Strobel*, 617 F.Supp. 699, 703-707 (E.D. Va. 1985)(J.S. at A-15 to A-30).

The prevailing Plaintiffs thereafter applied for an award of costs and attorney fees under 42 U.S.C. § 1988 in the amount of $17,035.77. The district court concluded, however, that it was equitable to let the costs "lie where they land" and denied the Plaintiffs' request for fees, finding that the Plaintiffs' action was a "carefully orchestrated attack on a Virginia statute," an "assault" which had been "masterminded" by the bookselling industry. (J.A. 83-84).

After briefing and oral argument, a panel of the United States Court of Appeals for the Fourth Circuit rendered an opinion on June 12, 1986. The panel affirmed the district court's judgment that the Amendment was facially overbroad, but reversed the district court's refusal to grant attorney fees.

Defendant Stover, who had argued on appeal that the Plaintiffs had no standing to sue him, petitioned for rehearing with a suggestion for rehearing *en banc*. The Court of Appeals refused Stover's rehearing petition on September 26, 1986, by a vote of six to four, one judge having disqualified himself. (J.S. at A-13). Four days later, however, the panel issued a modified opinion. The court concluded that there was "little specific evidence presented below" to allow a determination of the amount of material affected by the Amendment. The court nevertheless affirmed the district court's conclusion that the Plaintiffs had standing to attack the Amendment, that the Amendment was overbroad on its face and that it was not a valid time, place and manner regulation. The Court of Appeals reiterated that the State was liable for the Plaintiffs' attorney fees, but this time affirmed the district court's decision releasing the local defendants from fee liability. *American Booksellers Ass'n, Inc. v. Commonwealth of Virginia*, 802 F.2d 691, 693-697 (4th Cir. 1986).

SUMMARY OF THE ARGUMENT

The Court of Appeals' judgment totally invalidating Virginia's 1985 juvenile display provision should be reversed because Plaintiffs failed to show the existence of an Article III case or controversy, and their contrived and artificial attack on the Amendment should not give them prudential standing to assert speculative claims of others not before this Court. Even if the Plaintiffs properly stood before this Court, Virginia's juvenile display provision is not overbroad on its face.

(1) Section 18.2-391 of the Code of Virginia has constitutionally barred the sale to children of sexually explicit material that is "harmful to juveniles", but not necessarily obscene for adults, for almost two decades. *See Ginsberg v. New York*. And Virginia's 1985 amendment to this statute did nothing more than make it illegal to knowingly display this very *same* material where children can examine and peruse it at their leisure.

This Court has repeatedly emphasized the jurisdictional requisite that a federal plaintiff present an actual case or controversy for adjudication; this Article III requirement holds as true for a First Amendment claim as for any other. These Plaintiffs, however, showed no such actual dispute involving the Amendment, launching instead a preemptive attack on the provision within two weeks of its effective date based on their speculative, irrational fears of what they perceived or at least claimed to have perceived—the Amendment's effect to be.

Only two booksellers presented any evidence as to the Amendment's supposed impact, and they hadn't the faintest idea as to which material the Amendment even applied. There was simply no evidence or a finding by either court below that any Plaintiff, or anyone else for that matter, had violated the Amendment, was violating it, or intended to violate it in the future by displaying "harmful to juveniles" material where children could examine and peruse it. Even assuming that a minuscule amount of a Plaintiff's merchandise fell within the Amendment's purview, Plaintiffs still failed to show an actual case or controversy: although it has been illegal for years to sell this very *same* material to children in Virginia, both booksellers who testified admitted that their past business practices had prompted no contact whatsoever with law enforcement officials; in fact, both of Plaintiffs' bookstore witnesses indicated their personal agree-

ment that children should not have access to harmful sexually explicit material.

(2) Even if these Plaintiffs are found to have presented an Article III case or controversy, they should be restricted to an adjudication of only *their* rights and interests, not the conjectural ones of others not before the Court. Prudential standing is not a matter of right; it is a matter of judicial self-governance that was implicitly exercised in Plaintiffs' favor by both courts below despite the dearth of evidence and the district court's recognition that the attack on Virginia's juvenile display provision was a "carefully orchestrated" and "masterminded" assault. When confronted with such a contrived attack on a two-week old State statute as presented here, this Court's normally relaxed prudential standing rules for First Amendment litigants should give way to the federal-state comity considerations the Court has consistently acknowledged as of "special importance."

(3) In *Ginsberg*, this Court acknowledged the States' "transcendent interest" in protecting children from exposure to pornography. And in *New York v. Ferber*, the Court found it "evident beyond the need for elaboration" that this interest is "compelling." This same interest underlies Virginia's display provision because a child is harmed by his or her *exposure* to pornography, regardless of how that exposure occurs. After all, what good is a *Ginsberg*-like proscription on the sale of pornography to children if it is displayed where they can still examine and peruse it? Whether a child buys pornography, rents it, or simply stands in a store and reads it, the harm to him is exactly the same.

While serving a legitimate and compelling interest, Virginia's Amendment at the same time allows the dissemination of the regulated material to adults: it simply requires that the material not be knowingly displayed where children can examine and peruse it. The ability of adults to have ultimate access to the material differentiates the Amendment from provisions such as the one found unconstitutional in *Butler v. Michigan*, and it is this balance that makes Virginia's provision consistent with the approach suggested by this Court on several occasions.

A facial attack claims that the statute is absolutely and totally void in all its applications. This Court has therefore consistently

admonished that facial invalidation for overbreadth is "manifestly strong medicine" to be used only as a last resort; and just because there are potential impermissible applications, facial invalidation is not required where a case-by-case analysis can obviate difficulties in construction.

A statute's overbreadth must be *real* and *substantial;* even then, it is still not voidable unless narrowing constructions are not readily available to State courts. The Amendment is not substantially overbroad for two reasons: first, the Plaintiffs showed, if anything, only a minimal impact on a bookseller's right to sell and an adult's right to obtain this material; second, the Amendment only regulates material that this Court has found can be constitutionally proscribed as to children. The only way that absolutely protected expression can be swept within the Amendment's ambit is through a merchant's uninformed and irrational reaction to the provision.

The Court of Appeals' misperception of the Amendment's substantial overbreadth is emphasized by that court's critical misreading of the provision's scienter element: a scienter requirement does not, as the Fourth Circuit found, demand that merchants review each item they stock to determine if it is covered by the Amendment; to the contrary, it actually relieves a bookseller of this obligation. *See Ginsberg v. New York; Hamling v. New York.*

Just as fatal to the lower court's analysis is its expansive reading of the Amendment, ignoring the much narrower meanings of the provision's terms which a Virginia court would be required to use. For example, the Court of Appeals read the word "may" literally so as to mean "conceivably" or "might," when, in fact, the context of "may" in the Amendment means a reasonable certainty or actual tendency.

The Fourth Circuit also found the Amendment deficient because it does not list specific methods of compliance. But the Amendment's terms and the definitions it uses are admittedly not vague, so the inclusion of specific modes of compliance is not necessary. All that is constitutionally required is that a statute plainly tell what it makes illegal and this the Amendment does.

The Court's further finding that the Amendment is not an appropriate time, place and manner regulation because it in-

volves the "content of the regulated speech" is similarly misplaced. The Amendment does concern the content of expression, but only to the extent that to be subject to the Amendment's requirements sexually explicit material must be "harmful to juveniles." The provision does not attempt to regulate the speech itself, and this is the hallmark of any permissible time, manner and place restriction such as the ones validated by this Court in *Young v. American Mini Theatres* and, more recently, in *Renton v. Playtime Theatres.*

ARGUMENT

I. PLAINTIFFS LACK STANDING TO ATTACK THE STATE STATUTORY AMENDMENT

This Court has established a two-step inquiry to determine whether a litigant has the requisite standing to proceed before a federal court. First, a plaintiff must satisfy the Article III requirement that he present the court with an actual case or controversy by showing that he suffers a realistic possibility of criminal prosecution or other "injury-in-fact." This Article III inquiry goes directly to the court's jurisdiction to adjudicate an asserted dispute. *Secretary of the State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984); *Warth v. Seldin*, 442 U.S. 490 (1975)

Without an actual case or controversy between the parties, there exists no need to examine the second prong of the standing inquiry. If a case or controversy exists, however, then the court must determine whether the party before it has standing to assert the particular legal rights and interests presented for adjudication. This second step inquiry, known as prudential standing, is a matter of judicial self-governance, designed as a practical limitation on the court's adjudicative authority:

> The limitation [that a plaintiff generally must assert his own legal rights and interests] "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where this constitutional application might be cloudy," *United States v. Raines*, 362 U.S., at 22, and it assures the court that the issues before it will be concrete and sharply presented. [Footnote omitted].

Munson, 467 U.S. at 955; *see also Warth*, 422 U.S. at 500.

A. THERE IS NO ARTICLE III CASE OR CONTROVERSY BEFORE THE COURT

The Amendment proscribes the knowing commercial display of material deemed harmful to juveniles in a manner permitting juveniles to examine and peruse the restricted matter. The material affected by the Amendment is precisely the same as that which is properly forbidden for sale to juveniles by the pre-existing statute. *See Ginsberg v. New York*, 390 U.S. 629 (1968).

Neither the bookstore owners who testified at the hearing, nor either lower court, paused to consider what material actually fell within the statutory prohibition. Instead, the entire case has proceeded upon the mere assumption that one of the two Plaintiff bookstores or an unidentified member of one of the trade associations displayed material violative of the Amendment. In *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979), this Court succinctly summarized the issues germane to determining whether an actual case or controversy exists: the plaintiff must establish a real, substantial controversy such that the statute's enforcement creates a "realistic danger of sustaining a direct injury;" although a party need not await consummation of the threatened injury, imaginative, hypothetical or speculative fears of injury are wholly insufficient to confer standing. *Id.* at 298.

While the Court has relaxed prudential standing requirements in cases raising First Amendment overbreadth claims, *see e.g., Munson*, 467 U.S. at 956-57, it has never relaxed Article III's jurisdictional case or controversy requirement. Here, the question of whether Plaintiffs have a justifiable fear of prosecution or an economic injury should never have been reached without a demonstration that at least one of them knowingly displays material considered harmful to juveniles under § 18.2-390(6) in a manner where juveniles can examine and read it carefully and thoroughly. This threshold Article III showing was neither alleged in the complaint nor demonstrated by Plaintiffs' evidence.

Although the district court found that five to twenty-five per cent of the material carried in Northern Virginia bookstores is "harmful to juveniles" (J.S. at A-20), there is nothing in the record to support this conclusion. Even the Court of Appeals,

although finding that a case or controversy existed, admitted that "there was little specific evidence presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restriction." *Booksellers*, 802 F.2d at 696 (J.S. at A-9). And, what little evidence that was presented established, if anything, the lack of an actual case or controversy.

Helen Ross, testifying on behalf of Ampersand Books, introduced into evidence several books she had removed from her shelves which she believed *might* violate the display provision. Yet, she testified that she was unaware of the statutory definition of "harmful to juveniles" (J.A. 56), and Virginia certainly did not admit that the display of any of these books would violate the Amendment. Ross also said that she carried only perhaps half a shelf of books that she would not sell to juveniles, but there was no testimony or finding that these books either fell within the Amendment's ambit or were displayed where juveniles could examine and peruse them. If Ross' testimony reveals anything, it is that she would not display any material for juveniles to examine and peruse that she would not sell to them.

Carol Johnson testified on behalf of Books Unlimited, Inc. Her testimony is even more striking than Ross'. She identified and introduced into evidence eight books she had selected from her shelves which she believed violated the statute, but at least four of these books were specifically designed for her juvenile clientele. (J.A. 72-74). Her concern was simply that these materials, while appropriate for young teenagers and up, would not be appropriate for younger children. She stated that young children are "just not ready" for the narrative, and the pictures "they are just going to titter over" (J.A. 74); but material which merely causes young children "to titter" can hardly be assumed to appeal to their "prurient" interest under § 18.2-390(6). Importantly, there was no evidence that any of these books, with the obvious exception of those tailored for juveniles, were displayed where juveniles could examine and peruse them. Johnson did state that she has "some" adults-only books, but to her knowledge no juvenile has ever examined or perused them; in fact, she places these books, occupying only half a shelf in her store, where "I can keep an eye on them." (J.A. 78).

As for the Plaintiff trade associations, while they may have standing to assert claims on behalf of their Virginia members, they must first show the existence of an Article III case or controversy. *See Secretary of the State of Maryland v. J.H. Munson Co.* Yet, the associations never identified any of their Virginia members other than Ampersand Books and Books Unlimited, Inc.[1] Whoever the trade associations' other members might be, no evidence showed that they even carried "harmful to juveniles" material, much less that they displayed it in violation of the Amendment. The associations' Article III standing therefore rises no higher than that of the two Northern Virginia bookstores, which is non-existent.[2]

These Plaintiffs cannot conjure a case or controversy out of thin air where there is no credible evidence that some Plaintiff, somewhere, has previously violated, is currently violating or intends in the future to violate the Amendment by displaying "harmful to juveniles" material in a manner such that children can examine and peruse it. Plaintiffs simply failed to show a realistic chance of criminal prosecution to establish the existance of an Article III actual case or controversy. Stated another way, can there be any doubt what Plaintiffs' argument would be if they were before this Court challenging a conviction for violating the Amendment under these facts? Just as there would be no evidence to sustain such a conviction in that case, there is no evidence to establish the existence of an actual case or controversy in this one.

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[1] The only evidence of these bookstores' membership in any trade association related to Plaintiff American Booksellers Association. There was no claim or evidence that Ampersand Books or Books Unlimited even belonged to the other Plaintiff trade associations. Indeed, Plaintiff International Periodical Distributors Association did not even allege, much less show, that it had any members located in or doing business in the Commonwealth of Virginia.

[2] In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Court held that the Apple Commission had standing to litigate the claims of its constituent members. In *Hunt*, however, the plaintiff showed injury to Washington's apple growers by the challenged statute and thus obtained standing. *Id.* at 337-38. There was no such showing here.

At best, then, it is purely conjecture that after the Amendment's passage either Plaintiff bookstore faced even a remote chance of either investigation or prosecution for continuing to do business as they had always done. In fact, the district court found in its order denying attorney fees that "actual enforcement of the statute [in the Northern Virginia area] was considerably less likely." (J.A. 84). It is true, of course, that even if Plaintiffs do not have a realistic chance of prosecution, they can still show that a case or controversy exists by establishing that the challenged provision will cause them "injury in fact." *See Munson*, 467 U.S. at 954-55. Once again, however, they can rise no higher than Ampersand Books and Books Unlimited: evidence of a credible threat of "injury in fact" must have been shown by one of these two Northern Virginia bookstores, or not at all.

Any claim of economic injury caused by compliance with the Amendment was founded only on the bookstore owners' misapprehension of what the statute requires. For example, their claims that they must review each of their books simply shows a gross misunderstanding of the Amendment's scienter requirement. *See infra* at 30-31. And their guesses as to the impact on their businesses were made in admitted ignorance of the legal standards governing the material affected. (J.A. 26, 56, 30, 82).

This Court has consistently found that objective facts, not subjective fears, of injury are required to demonstrate an Article III case or controversy. *See e.g., O'Shea v. Littleton*, 414 U.S. 488 (1974). The alleged impact of the Amendment upon Ross' and Johnson's businesses is irrational and illusory, apparently caused by how the Amendment was "explained" to them by the American Booksellers Association at the time of the Amendment's effective date. (J.A. 40-41, 69). Indeed, although it has been illegal to sell "harmful to juveniles" material for almost two decades, Johnson admitted that *the issue had never arisen*. (J.A. 58.) The only action any of these Plaintiffs has ever taken because of the Amendment is to join the lawsuit attacking it. There is no actual case or controversy for this Court to decide.

B. THIS COURT SHOULD DENY PRUDENTIAL STANDING TO THESE PLAINTIFFS

Should the Court determine that a case or controversy existed between any defendant and a particular Plaintiff, however, the issue remains as to whose rights and interests can be asserted by that Plaintiff. If either bookstore showed a controversy, the evidence is clear that at most a minuscule number of its books fall within the definition of "harmful to juveniles." The Amendment's minimal impact on these two bookstores, when weighed against Virginia's compelling interest in protecting the welfare of children, clearly demonstrates the Amendment's constitutional validity with respect to them. *See infra* at 26.

This Court has, of course, previously accorded litigants of First Amendment facial overbreadth challenges expanded prudential standing to assert the claims of others. *See Munson*, 467 U.S. at 956-58. In this respect, both lower courts here placed great emphasis upon the limitations which they believed the Amendment might place on the general public's "right of access" to material obscene for juveniles, but not for adults. This Court should balance the interests of federeal-state comity with the relaxed standing doctrine generally applicable in the First Amendment context. In the case at bar, a balancing of these competing interests weighs in favor of denying any Plaintiff prudential standing to assert the rights of others not before this Court.

The important interest in avoiding needless friction between the States and the federal government has been repeatedly recognized by this Court. *See e.g., Rizzo v. Goode*, 423 U.S. 362, 377-380 (1976). So important is the preservation of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law," *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951), that this Court normally refuses injunctive relief in actions challenging prospective enforcement of state criminal laws, even where the plaintiff asserts his *own* legal rights and interests. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977)(White, J., dissenting in part).

Surely the contrived preemptive strike Plaintiffs launched against the Amendment in the district court is one of the most serious attacks on State sovereignty imaginable. This problem is only exacerbated by the obvious recruitment of local Virginia

plaintiffs, without full and complete disclosure to them of the limiting effect Virginia Code § 18.2-390(6) and (7) places on the Amendment's application. The courts below, however, failed to give any weight to basic principles of federal-state comity. Instead, the district court rejected a request to abstain from deciding the issue —a course of action suggested by this Court in *Babbitt v. United Farm Workers*—and granted prohibitory injunctive relief in violation of the rule that only "exceptional circumstances" warrant federal injunctive relief against prospective, and here speculative, state prosecutions. *See Wooley*, 430 U.S. at 711-712 (finding exceptional circumstances where plaintiff had been prosecuted three times within five weeks).

The limitations placed upon the ability of a party before a federal court to litigate the rights and interests of others are "essentially matters of judicial self-governance. . . ." *Warth*, 422 U.S. at 500. This Court clearly has the authority and the power to define the scope of prudential standing allowed plaintiffs who invoke Article III jurisdiction by manufacturing an attack on state legislation in a preemptive fashion. Virginia urges this Court to determine that federal-state comity interests outweigh any interest in giving Plaintiffs expanded prudential standing, and thus reenforce the "special delicacy" of federal-state relations it has recognized in the past. *See Rizzo*, 423 U.S. at 378. Even if Plaintiffs have standing to assert the First Amendment rights of others, however, the Amendment is manifestly not facially overbroad as to either them or any party not before the Court.

II. THE AMENDMENT IS NOT FACIALLY OVERBROAD

A. INTRODUCTION

It is now axiomatic that not all speech is protected by the First Amendment. Obscene material certainly does not fall within the parameters of constitutionally protected expression. *Miller v. California*, 413 U.S. 15 (1973). Nor does material depicting sexual performances by children enjoy First Amendment protection. *New York v. Ferber*, 458 U.S. 747 (1982).

The 1985 amendment to Virginia Code § 18.2-391, like the statute as a whole, does not regulate material which is obscene as to adults. Instead, both the Amendment and the pre-existing statute are designed to protect children from exposure to sexually

explicit material which is harmful to them as defined by Virginia Code § 18.2-390. The Amendment is the progeny of *Ginsberg v. New York*.

In the spring of 1968, the Court rendered its decision in *Ginsberg*, upholding a New York law prohibiting the exposure to children of sexually explicit material which, though not obscene as to adults, was deemed to be "harmful to minors." *Ginsberg's* doctrine of "variable obscenity" is founded on the principle that the definition of obscenity may be constitutionally adjusted "to social realities by permitting the appeal of...[sexually explicit] material to be assessed in terms of the sexual interest...of...minors." 390 U.S. at 638, *quoting Mishkin v. New York*, 383 U.S 502, 509(1966). Because of the governmental interest in protecting children's welfare, it is "altogether fitting and proper for a State to include in a statute designed to regulate the sale of pornography to children special standards broader than those embodied in legislation aimed at controlling dissemination of such material to adults." 390 U.S. at 640 (citation omitted).

A State may, of course, go too far in attempting to protect children from pornography. In *Butler v. Michigan*, 352 U.S. 380 (1957), for example, the Court unanimously struck down a law making it illegal "to make available for the general reading public ... a book ... found to have a potentially deleterious influence upon youth." *Id.* at 382-83. But the *Butler* statute forbade the dissemination of non-obscene material under any circumstances if it might be harmful to children, thus reducing "the adult population of Michigan to reading only what is fit for children." *Id.* If a provision does not deny booksellers the right to provide non-obscene material to adults or deny adults ultimate access to the material, however, it is not defective under *Butler*. *See Ginsberg*, 390 U.S. at 634("[The New York statute] does not bar appellant from stocking the magazines and selling them to persons seventeen years of age or older, and therefore the conviction is not invalid under our decision in *Butler v. Michigan.*")

With *Ginsberg's* recognition of a State's legitimate and constitutional responsibility to protect children from exposure to material obscene as to them came the General Assembly of

Virginia's 1970 enactment of §§ 18.2-390 and 391; in fact, the Virginia provisions were almost verbatim copies of the New York statute validated in *Ginsberg*. Five years later, and again in accord with a decision of this Court, § 18.2-390(6)'s definition of "harmful to juveniles" was modified to comport with the standard enunciated in *Miller v. California*.

The Virginia statutes remained unchanged for some ten years. Then, in 1985, the General Assembly enacted the Amendment to § 18.2-391 under attack here. Although the Amendment may, at first glance, seem to depart somewhat from *Ginsberg* because it deals with the display of pornography, not merely its sale, the *Ginsberg* Court characterized the statute involved there as prohibiting minors' "*access*" to the material, as a regulation of "the *availability* of sexual material to minors" and as a restraint on "minors' '*exposure* to such material.' " 390 U.S. at 636, 639, 641 (emphasis added).

In addition to its holding in *Ginsberg*, this Court has made clear on several other occasions that its concern for children is not limited to just their actual purchase of sexually explicit material. In *Jacobellis v. Ohio*, 378 U.S. 184 (1964), six members of the Court agreed that a movie was not obscene, but Justice Brennan suggested for a plurality: "State and local authorities might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children. . . ." *Id.* at 195. In fact, the plurality cited with approval *State v. Settle*, 90 R.I. 195, 156 A.2d 921 (1959), where the Rhode Island Supreme Court upheld a statute which, although using pre-*Ginsberg* definitions, made it unlawful to commercially "show" certain sexually explicit material to children. *Id.* at 923.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court overturned a conviction for possessing obscene material in a private home as unconstitutional, but "approved[d] the validity of regulatory action taken to protect children . . . when obscenity is . . . displayed publicly." *United States v. Reidel*, 402 U.S. 351,

360 (1971)(Marshall, J., dissenting); *see Rabe v. Washington*, 405 U.S. 313, 317 (1971)(Burger,C.J., concurring, joined by Rehnquist,J.)(commenting favorably on laws protecting children from public display of obscene material).

Shortly thereafter, *Miller v. California* recognized that the States have a legitimate interest in "prohibiting . . . *exhibition* of obscene material when the mode of dissemination carries with it a significant danger of . . . *exposure to juveniles.*" 413 U.S. at 18-19 (emphasis added). Two years later, the Court acknowledged that society has the right to adopt more stringent controls on communicative material available to youths than on that available only to adults. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212, 216 n.15 (1975).

In 1976, a four-member plurality of the Court, speaking through Justice Stevens, took it for granted that exposure to minors of sexually explicit material could be constitutionally prohibited, noting with some irony that:

> [T]he Members of the Court who would accord the greatest protection to [sexually explicit] material have repeatedly indicated that the State could prohibit the distribution or *exhibition* of such materials to juveniles. . . . Surely, the First Amendment does not foreclose such a prohibition.

Young v. American Mini Theatres, Inc., 427 U.S. 50, 69-70 (1976) (emphasis added). And, once more in 1978, the Court held that adult access to non-obscene, but sexually explicit, material can be limited in some circumstances in order to insulate minors' exposure to its effects. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). It can hardly be said, then, that Virginia's 1985 display provision sprang from untilled constitutional soil.

B. FACIAL OVERBREADTH: THE STANDARD

When one undertakes a First Amendment facial challenge to a statute, he claims, as do the Plaintiffs here, that it is invalid in all its applications: "A 'facial' challenge . . . means a claim that the law is 'invalid—and therefore incapable of any valid application.'" *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982) (citation omitted); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, ___, 105 S.Ct. 2794, 2802-03, 86 L.Ed.2d 394, 407 (1985).

Facial invalidation, however, is not the usual or desired method of dealing with a State statute: "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613-14 (1973). Indeed, this Court has "'never found that a statute could be facially invalid merely because it is possible to conceive of a single impermissible application. ...'" *Ferber*, 458 U.S. at 772 (citation omitted.)

Although a statute's chilling effect on third parties' First Amendment rights can be considered in an overbreadth analysis, *substantial* overbreadth remains the rule. The State's interest in enforcing its own statutes must be weighed against this potential "chilling effect," and this interest prevails unless the "overbreadth of a statute [is] not only . . . real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615 (emphasis added).

This "substantiality" requirement is even greater where the statute deals with obscenity or, as here, with non-obscene material with less than absolute First Amendment protection, material falling only "in the shadow of the First Amendment." *See Broadrick*, 413 U.S. at 614-15.[3] The Court's "decisions have displayed a greater willingness to permit content-based restrictions when the expression at issue fell within certain special and limited categories." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 n.7 (1983), *citing Miller v. California*. And it does not matter that the challenged regulation applies to pure speech rather than conduct: *substantial* overbreadth is still required. *Ferber*, 458 U.S. at 772; *Brockett*, 472 U.S. at ___, 86 L.Ed.2d at 406 n.12.

Not only must there be substantial overbreadth, but there must also be no narrowing construction readily available to the State courts: "[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. . . ." *Erznoznik v. City of Jacksonville*, 422 U.S. at 216 (citation omitted). "Facial overbreadth has not been invoked

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[3]Harmful to juveniles material is "likely to be on the 'borderline between pornography and artistic expression' since to be subject to the [provision] the material must be obscene at least as to children." *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1396 (8th Cir. 1985).

when a limiting construction has been or *could* be placed on the challenged statute." *Broadrick*, 413 U.S. at 613-614 (emphasis added). This is because, "[w]hile a sweeping statute, or one incapable of limitation, has the potential to repeatedly still the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *Ferber*, 458 U.S. at 772.

The mere possibility of an unconstitutional application is not a basis for facial invalidation. The meanings of all words—except perhaps technical scientific terms—encompass ambiguities: "Words inevitably contain germs of uncertainty." *Broadrick*, 413 U.S. at 608. Just because a statute "may be susceptible of some other improper applications," facial invalidation is not required. *Id.* at 618.

Finally, State statutes should not be facially stricken where case-by-case review can obviate difficulties in construction. As the *Broadrick* Court said:

> It is our view that [the statute] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

413 U.S. at 615-16. Or, as stated somewhat differently in *Flipside*, " '[a]lthough it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise.' " 455 U.S. at 504 (citation omitted).

C. FACIAL OVERBREADTH: APPLICATION TO THE AMENDMENT

Under the guiding principles of the First Amendment facial overbreadth analysis, the Court of Appeals' facial invalidation of the Amendment was clearly erroneous: the Amendment serves a compelling State interest; it does not have a real and substantial deterrent effect on legitimate expression; and, if necessary, narrowing constructions of the Amendment are readily available.

1. The Amendment Serves Compelling State Interests

This Court has consistently recognized that a State has two weighty interests in protecting the welfare of minors by prohibiting their exposure to pornography. In *Ginsberg*, the Court acknowledged "'society's *transcendent* interest in protecting the welfare of children.'" 390 U.S. at 640 (citation omitted)(emphasis added). The States also have an equal, but independent, interest in protecting parents' right "to direct the rearing of their children", which "is basic in the structure of our society." *Id.* at 639.

The States have similarly recognized their strong interests in this area and have acted accordingly: forty-eight States have laws regulating minors' access to pornographic material. (Georgia Brief—Appendix A). So too have numerous localities enacted such provisions, including the cities of Minneapolis and Wichita. *See Upper Midwest Booksellers v. City of Minneapolis; M.S. News v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

Lay commentators have likewise discerned and supported these State interests. As the *Minneapolis Star and Tribune* editorially commented with respect to the display provision enacted by the City of Minneapolis and upheld by the Eighth Circuit in *Upper Midwest:*

> Minneapolis residents may differ about whether adults should be free to buy pornography, but most concur that children shouldn't be exposed to it.
>
> * * *
>
> [Minneapolis' display provision] achieves two desirable ends: controlling pornography's troubling side-effects while leaving adults free to sell, buy and read whatever they like.

Minneapolis Star and Tribune, January 6, 1986, at 10A. (Appellant's Lodging at 84).

As this Court stated in *Ferber:* "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*.'" 458 U.S. at 756-57 (citation omitted)(emphasis added). Virginia's display provision serves this same compelling interest. Indeed, "what value would a statute restricting only sales have if minors

can still peruse and examine the materials?" Comment, *See No Evil: The Divisive Issue of Minors' Access Laws*, 17 Cumb. L. Rev _____ (1987) (Appellant's Lodging at 33-34).[4] Quite obviously, the answer is none: "the regulation of sales without control over commercial displays of materials deemed harmful to minors would render" meaningless the protective efforts constitutionally validated by this Court in *Ginsberg*. *See American Booksellers Association, Inc. v. Rendell*, 322 Pa. Super. 537, 481 A.2d 919, 942 (1984).

The courts below acknowledged this interest, but nonetheless concluded that it cannot withstand the Amendment's perceived overbreadth.[5] To the contrary, the Amendment strikes a reasonable balance between protected First Amendment rights on the one hand and Virginia's admittedly legitimate interest in protecting its children from pornography on the other.

2. The Amendment Does Not Substantially Deter Protected Expression

Broadrick v. Oklahoma brought the overbreadth doctrine into clear focus. The *Broadrick* Court emphasized that the function of an overbreadth challenge—to guard against inhibitions on free speech—weakens as you move from speech toward conduct without any speech. Mindful that the only rationale for the existence of the First Amendment overbreadth doctrine is to quell the "chilling effect" on protected speech, *Broadrick* reasoned that, although a statute may inhibit such speech "to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." 413 U.S. at 615.

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[4]A draft copy of this law review article has been lodged with the Court in the Appellant's Lodging. It will be published in June 1987 under this citation.

[5]The district court acknowledged that the Amendment's purpose serves a substantial governmental interest, going so far as to characterize Virginia's interest as "praiseworthy." *Strobel*, 617 F. Supp. at 705 (J.S. at A-28, A-26). The Fourth Circuit made a similar admission: "There is no question that a state government has an interest in shielding minors from some sexually explicit materials which are not considered obscene as to adults." *Booksellers*, 802 F.2d at 694 (J.S. at A-6).

In *New York v. Ferber*, this Court upheld a New York child pornography statute, despite its admitted potential overbreadth, because the protection of children from pornography is a special and particular area of State concern. The Court found the State's interest "compelling," justifying "special treatment." 458 U.S. at 757. In such a case of overriding State interest—there, as here, the protection of children—"the balance of competing interests is clearly struck" and the statute survives. *Id.* at 764.

The Fourth Circuit should have reached the same result here. Instead, the court voided Virginia's display provision because the Amendment supposedly unreasonably limits adult access to sexually explicit material and significantly interferes with booksellers' business practices. Yet the court acknowledged that"[t]here was little specific evidence below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions." *Booksellers*, 802 F.2d at 696 (J.S. at A-10). The Court of Appeals simply *assumed* that book retailers face a substantial problem, stating: "It cannot be gainsaid, however, that book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale." *Id.* at 696 (J.S. at A-9). This assumption flies in the face of both the Plaintiffs' own evidence and the legal principles involved.

The Amendment, like the pre-existing statute, does not in any way prohibit the continued sale of affected material to adults: it simply requires that the material not be displayed where juveniles can examine and peruse it. In *Erznoznik v. City of Jacksonville*, the Court reviewed an ordinance prohibiting drive-in movie theatres from showing films containing nudity when the screen is visible from a public street or place. While the ordinance was found to be facially overbroad because it proscribed nudity that was not obscene even as to children, the Court suggested that the ordinance would have been valid if limited to movies that are obscene for minors.[6]

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[6]"The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors." 422 U.S. at 216 n. 15. None of the defendants, however, had suggested such a construction.

In another context, the Court has found that *how* First Amendment protected speech is "displayed" to the public can be legitimately regulated. In *FCC v. Pacifica Foundation*, the FCC sought not to ban public broadcasts of indecent, but non-obscene language, but to "channel it to times of day when children most likely would not be exposed to it." 438 U.S. at 733. The question presented was whether the public broadcast of such language could ever be restricted because of its content. Noting that "[b]ookstores . . . may be prohibited from making indecent material available to children," the Court found the FCC regulation permissible. *Id.* at 749, *citing Ginsberg*.

Similarly, in *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968), the Court considered the constitutionality of a Dallas ordinance prohibiting the showing to children of films having material "not suitable for young persons." Although invalidating the Dallas provision because of its vagueness in describing the material within its ambit, the Court, again citing *Ginsberg*, pointed out "that because of its strong and abiding interest in youth, a State may regulate the *dissemination* to juveniles of, and their *access* to, material objectionable as to them, but which the State clearly could not regulate as to adults." *Id.* at 690 (emphasis added).

It is beyond question, then, that provisions regulating the display of material obscene as to minors do not inherently deter protected expression in a real and substantial fashion. And Plaintiffs' evidence certainly does not establish such an impact here, where their own witnesses either did not know what Virginia's definition of "harmful to juveniles" meant or disagreed with it in principle.

a. Retailers' Ability To Operate Is Not Impaired

It must be remembered that retail booksellers are merely commercial vendors of any potential message: like the theatres in *American Mini Theatres*, "[t]hey do not profess to convey their own personal messages through the [materials], so that the only communication involved is that contained in the [materials] themselves." 427 U.S. at 78 n.2. Moreover, as in *Ferber*, "it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope,

may be less likely to be deterred than the employee [in *Broadrick*] who wishes to engage in political campaign activity." 458 U.S. at 772. After all, retailers have only an "attenuated interest in displaying and marketing merchandise in the manner that the retailer desires." *Flipside*, 455 U.S. at 496.

This is particularly true here, given the minute, if any, amount of material shown to be affected by the Amendment. Helen Ross stated in her affidavit that she did not know the meaning of the term "harmful" in the Amendment's context. (J.A. 26). Then, when she testified, she reiterated that she did not know the legal definition of "harmful to juveniles." (J.A. 56). In a similar vein, Heather Florence merely had a complaint with the definition of "harmful to juveniles" which, according to her, was too vague to determine which material might fall within its ambit. (J.A. 61). Yet this "vague" definition was the same one found constitutionally sufficient by this Court nineteen years ago in *Ginsberg*.

As for Carol Johnson, her affidavit stated concern about the meaning of the terms "harmful" and "sexual conduct," although both are defined under Virginia law as in *Ginsberg*, and wondered who would determine their meaning. (J.A. 30). She then admitted at the hearing that she had never read the definition of "harmful to juveniles;" in fact, she was not even aware that Virginia law defined that term. (J.A. 82).

Consequently, although Ross and Johnson attempted to guess which, if any, books "might" be affected by the Amendment, they had absolutely no framework for doing so. Simply put, their evidence was presented in a legal vacuum and should have been ignored by both the district court and the Court of Appeals.[7]

Even if this pervasive defect in Ross' and Johnson's testimony is ignored, their evidence still fails to support a finding that the Amendment has a *real* and *substantial* deterrent effect on a retail bookseller's ability to operate. For example, while Johnson testified that the Amendment would have a "tremendous impact"

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[7]Virginia objected to this testimony because it was not based on a knowledge of Virginia law, but merely on what Ross, Johnson and Florence subjectively, and wrongly, thought the law to be. The objection was overruled. (J.A. 43).

on her business, she could name only *one* book, *The Joy of Sex*, that might appeal predominantly to the prurient interest of juveniles. (J.A. 77). When asked what percentage of her stock she regarded as "adults only" books, she only mentioned a series of books by anonymous authors, all of which were already grouped together on a half of a shelf in her store. Even then, she admitted that she does not now sell these books to children and that no minor had ever come into her store, picked one up and leafed through it. (J.A. 78, 82). Johnson adduced several books as exhibits, but she did not think they were harmful to children: she just thought the Amendment might cover them because she did not know the definition of "harmful to juveniles." (J.A. 74). Johnson did mention Judy Blume's *Forever* as a book which she had refused to sell to some juveniles she thought too young for it, but she thought it appropriate for older juveniles. (J.A. 67, 81).

Helen Ross thought that the Amendment might affect thirty to fifty per cent of her inventory, but she reached this estimate in admitted ignorance of the applicable legal standards. Indeed, she even believed that the Amendment proscribes a simple depiction of human nudity (J.A. 50), which of course is not true either for adults, *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), or for juveniles. *Freeman v. Virginia*, 223 Va. 301, 311, 288 S.E.2d 461, 466 (1982). When asked to apply the legal definition of "harmful to juveniles" to the exhibits she had submitted into evidence, Ross did not believe that any of them fell within the definition. (J.A. 53) When asked which of her books she had ever refused to sell to a juvenile, Ross said that *the matter had never arisen*. (J.A. at 58). Yet the definition of "harmful to juveniles" and the bar to the sale of such material to children has been a part of Virginia's statutory scheme for years.

In fact, there is no reason to believe that any of Ross' and Johnson's exhibits would be affected by the Amendment; certainly neither court below made such a finding. For instance, one of Plaintiffs' prime exhibits is *The Penguin Book of Love Poetry*, an anthology of poems on human affection. It includes, among other poems, works by Elizabeth Barrett Browning, William Shakespeare, Robert Burns, Robert Browning, and John Milton. Yet, because of two erotic poems on pages 107 and 112 and the book's cover showing a mildly erotic detail from an

allegorical painting by Bronzino displayed in the National Gallery in London. Plaintiffs purported to fear that a court would conclude that this book (1) predominantly appealed to the prurient interest of juveniles, (2) is patently offensive to prevailing standards in the adult community with respect to what is suitable matter for juveniles, and (3) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles. *See* Virginia Code § 18.2-390(6). Such a concern, even if truly held by retail booksellers, is simply too irrational to be a judicially cognizable basis for assuming that they have a "substantial problem" in complying with the Amendment as the Fourth Circuit assumed. This exhibit is a good example of Plaintiffs' uninformed and overblown reaction to the Amendment and symbolizes their entire case.

But, even assuming that every one of Ross' and Johnson's sixteen exhibits would be affected by Virginia's display provision, they would constitute only a minuscule fraction of their stores' combined inventory of thirty to thirty-five thousand titles (J.A. 37-38, 68), an impact manifestly insufficient to establish that the Amendment's deterrent effect on a bookseller's ability to operate is both *real* and *substantial*. *See American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring)(an incidental and minimal impact on the distribution of regulated material does not infringe on the First Amendment).

An inquiry for First Amendment purposes does not involve economic impact; it looks only to the challenged provision's effect upon freedom of expression. *American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring). Even so, Virginia suggested several ways that a retail bookseller could comply with the Amendment without significantly interfering with its business practices: the bookseller could place materials behind so-called "blinders," in wrappers preventing perusal or in "adult only" racks. Even easier, perhaps, warning tags could be placed on the materials in question or they could be color coded. And this is particularly true here given the small number of works that might be affected.[8]

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[8]Although Ross and Johnson testified that the methods of compliance suggested by Virginia would be too burdensome and expensive, their conclusions were made in admitted ignorance of the law, thus leading them to assume a much greater amount of affected material than is actually the case.

The Court of Appeals rejected each of Virginia's suggested methods of compliance, but the court's reasons highlight its misperception of the legal principles involved. For example, the court rejected the use of "adults only" tags or displaying the restricted material behind "blinders" as ineffectual because these steps would not stop any "determined juvenile from examining and perusing the materials." But this is the same as finding that a bookseller could be prosecuted because a juvenile might break into his store in the middle of the night and examine and peruse regulated material; yet the Amendment only proscribes the *knowing* display of restricted material where juveniles can examine and peruse it. This scienter element allows a bookseller to comply by simply making an effort, by any reasonable means, to restrict the material from children. The inclusion of a scienter requirement is a recognition that " 'it is not innocent but calculated purveyance of filth which is exorcised.' " *Hamling v. United States*, 418 U.S. 87, 123-124 (1974) (citation omitted).

The Fourth Circuit's misunderstanding of the scienter requirement is further highlighted by its rejection of Virginia's assertion that this element allows the bookseller to avoid the hazards of self-censorship and its contrary finding that Virginia's suggested methods of compliance would require a bookseller to actually "read and make a content based judgement on each item on his shelves in order to select the ones requiring special treatment." *Booksellers*, 802 F.2d at 696 (J.S. at A-10). This is no more true of the Amendment than of the statue in *Ginsburg*, where this Court accepted that the scienter element " 'indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished.' " 390 U.S. at 644 (citation omitted) (emphasis in original). As the Virginia Supreme Court recognizes, a bookseller is culpable only if he is aware of the contents of the material. *Freeman*, 223 Va. at 311, 288 S.E.2d at 486.

Laws such as the Amendment plainly do not charge booksellers with actual awareness of the contents of every book and magazine in their store. *See Rendell*, 481 A.2d at 939-940. The scienter element means that a bookseller only has to take measures to comply with the Amendment after he is aware or has

reason to know of an affected work's contents. This requirement relieves him of the affirmative duty of reviewing all his material in advance. *Cf. Smith v. California*, 361 U.S. 147, 153 (1959) (finding an obscenity statute unconstitutional because it lacked any scienter requirement).

b. Adult Access is Not Deterred

Not only does the Amendment have no substantial deterrence on a bookseller's ability to operate, adult access to protected material is, at most, only minimally affected by the modes of compliance suggested by Virginia. In *M.S. News*, the Tenth Circuit considered a Wichita ordinance making it unlawful to knowingly display harmful to minors material unless it is placed behind "blinder racks" so that the lower two-thirds of the material is not exposed to view. Finding the Wichita regulation permissible, the court stated:

> [T]he proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them. The ordinance permits the 'display' of material harmful to minors if it is in blinder racks which conceal the lower two-thirds of the material. Thus, adults may still have some access to materials not obscene as to them, and they may purchase such material.

721 F.2d at 1288-89. Similarly, in *Rendell* the appellate court upheld a minors' access law similar to the Amendment, concluding:

> [A]lthough adults may be inconvenienced in their perusal or purchase of graphic materials harmful to minors, though not obscene for adults, adult access to these materials will not be significantly impaired. In addition. . . any inhibitory effect on dissemination to adults does not render the display provision constitutionally defective, given the State's legitimate interest in shielding children from these materials.

481 A.2d at 941.

More recently, the Eighth Circuit has validated a Minneapolis display provision even more restrictive than Virginia's. There, the complained of portion of the ordinance made it illegal to display harmful to minors material where minors might be present and able to see it unless it was at all times kept in a sealed wrapper. The court nevertheless found that the provision did not have a substantial impact on adult rights:

> Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to view from a merchant or. . . in segregated sections of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it.

Upper Midwest, 780 F.2d at 1395.

The court below concluded that, for a "variety of reasons," many adults would be deterred from exercising their rights, but made no attempt to explain what these reasons might be. *Booksellers*, 802 F.2d at 696 (J.S. at A-10). To the contrary, the Amendment manifestly does not prohibit adults from purchasing affected material, and it is this ultimate access that differentiates the Amendment from the statute found unconstitutional in *Butler v. Michigan*: absolutely barring restricted material from a bookstore so as to reduce the reading level of adults to that of children is one thing; providing adults ultimate access to the material by only prohibiting its manner of display where a minor can read or examine it in detail is quite obviously another, *See M.S. News*, 721 F.2d at 1288 n.12; *Upper Midwest*, 780 F.2d at 1395-96.

c. "Older Minors' " Access: A Non-issue

In dictum, the Fourth Circuit also questioned whether an "older minor's " First Amendment rights can be restricted by the standards applicable to younger minors. The court's concern was founded on its belief that the pre-Amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, while the display

provision could not be so selectively applied. *Booksellers*,802 F.2d at 695 n.7 (J.S. at A-7). The district court never addressed this issue, and the Court of Appeals' emphasis on a retailer's ability to determine what material might be harmful for one child, but not another, is wholly misplaced.

A bookseller's scienter—whether in the context of Virginia's harmful to juveniles provision or in that of adult obscenity statutes—does not depend upon her subjective belief as to what is or is not restricted. The scienter requirement is satisfied if the bookseller is aware of the nature of the material, even if she did not personally believe it proscribed:

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials. . . and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of [the statute] nor by the Constitution.

Hamling, 418 U.S. at 123-24

Moreover, material is only "harmful for juveniles" if it "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles." Virginia Code § 18.2-390(6). The determination of what is obscene for juveniles is no more based on what is fit for young juveniles than the adult obscenity standard turns on what is obscene for young adults. As the Supreme Court of Virginia stated in rejecting this same argument in the context of a similar statute: "It may be true that what is obscene for one child is not obscene for another. But. . . there is no constitutional requirement that all members of a defined class have the same levels of maturity or sensitivity or hold the same views." *Freeman*, 223 Va. at 312, 288 S.E.2d at 467, *citing Pinkus v. United States*, 436 U.S. 293 (1978)(community standard for judging adult obscenity does not focus on its most susceptible or sensitive members).

The same contention has been raised by the principal Plaintiff here in other cases and has been uniformly rejected. In *Rendell*, for example, the court stated: "[T]he legislature has consistently viewed minors as a generic class, as has the judiciary. More importantly, any criteria utilized must be objective. . . Thus, a complete enumeration of degrees of harmfulness, calibrated to correspond to varying levels of intellectual and emotional growth, would frustrate the legislative objective." 481 A.2d at 938. Or, as the district court observed in *American Booksellers Ass'n v. Webb*:

> The Court notes that a single standard of obscenity also is applicable to all adults, but the Court is not aware of any serious argument that such a standard is overbroad because it relegates more mature adults to reading or viewing only those materials that are appropriate for immature nineteen-year olds.

590 F. Supp. 677, 690 (N.D. Ga. 1984).

Variable obscenity statutes do not invade the area of free expression constitutionally secured to minors. *Ginsberg*, 390 U.S. at 637. And, except to the extent that the Fourth Circuit's unwarranted concern for "older minors" distorted its perception of the Amendment, the court's dictum is simply a non-issue in this case.

3. Narrowing Constructions Are Readily Available

Even if the Amendment deterred protected expression in a real and substantial manner, the Fourth Circuit's facial invalidation still was not justified unless no narrowing constructions were readily available. *Erznoznik*, 422 U.S. at 216. Facial overbreadth should not be invoked when a limiting construction *can* be placed on the challenged statute. *See Broadrick*, 413 U.S. at 613. This requirement is not unusual, of course, the general rule being that, if a state law is susceptible of an interpretation supporting its constitutionality, a federal court must accord the law such meaning. *See Screws v. United States*, 325 U.S. 91, 98 (1943)(pluralilty opinion). Or, as the Fifth Circuit has aptly stated:

> Where a state statute, not yet construed by the state courts, is susceptible of one construction that would leave it free of constututional infirmity and of another construction that might not, then the district court should not place itself in the position of holding a statute unconstitutional by giving it the latter construction only to discover that the state courts would give it the former.

Ziegler v. Ziegler, 632 F.2d 535, 538 (5th Cir. 1980).

The mere possibility of an unconstitutional application is not a basis for facial overbreadth invalidation: "It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." *Ferber*, 458 U.S. at 772 n.27. So it was that this Court upheld the facial validity of State laws in *Broadrick* and *Ferber* which admittedly could be susceptible to some improper application. 413 U.S. at 618; 458 U.S. at 773. As Justice Marshall stated for the Court in rejecting a First Amendment overbreadth challenge to an anti-noise provision: "It is possible, of course, that there will be unconstitutional applications, but that is not a matter which presently concerns us." *Grayned v. City of Rockford*, 408 U.S. 104, 121 n.50 (1972).

Despite such admonitions, the Fourth Circuit turned the rule on its head by assuming the broadest possible meaning of the Amendment without even considering the provision's own narrowing terms. For instance, the term "display" as used in the Amendment is restricted by the provision's own words: not every display of harmful to juveniles material is made illegal; only displays that permit children to *examine and peruse* such material are proscribed.[9] Yet the court below never even considered this restrictive language.

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[9]The *American Heritage Dictionary* 456 (2nd College Ed. 1982) defines "examine" as "[t]o inspect in detail *** [t]o observe or analyze carefully." Similarly, "peruse" means "[t]o read or examine, especially with great care." *Id.* at 979.

Perhaps the lower court's most critical error, however, was its equation of the term "may" with "conceivable," reading "may" literally so as to mean that, if a child *might* examine the pornography by any means, then it would be "displayed" within the context of the Amendment. *Booksellers*, 802 F.2d at 896 (J.S. at A-10.) But the word "may", when used as an auxiliary verb as here,[10] is susceptible to several meanings: while it can mean mere possibility as the Fourth Circuit assumed, it can just as easily mean expectancy, reasonable certainty or actual tendency. *See Corn Products Ref. Co. v. FTC*, 324 U.S. 726, 738 (1945); *Greyhound Corp. v. Excess Insurance Co. of America*, 233 F.2d 630, 634 (5th Cir. 1956). As with most words, the context of "may" is all important. *Id.* And it is clear from the context of the Amendment that it is the latter and much narrower meaning of "may" that is consistent with the legislative intent behind the Amendment, not the Court of Appeals' assumption of the former, broader meaning.

The legislative reasoning behind the Amendment is easily discernible: it is manifestly *not* intended to deny adults ultimate access to protected material or to stop merchants from selling it; rather, because proscribing the sale or loan of "harmful to juveniles" material to children is constitutionally permissible under *Ginsberg*, it is irrational, indeed absurd, to allow the display of this very *same* material so that children can peruse and examine it at their leisure, regardless of whether they eventually buy or borrow it. *See Rendell*, 481 A2d at 942.

The narrow meanings of the Amendment's terms are perfectly consistent with this legislative intent, especially since Virginia law requires that criminal laws be strictly construed against the prosecution. *See Commonwealth v. Ellett*, 174 Va. 403, 4 S.E.2d 762 (1939). And a Virginia court can and will narrow a statute's language, if necessary, without "rewriting" it in order to save its constitutionality. *See e.g., Price* v. *Commonwealth*, 214 Va. 490, 201 S.E.2d 798, *cert. denied*, 419 U.S. 902 (1974)(Supreme

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[10] "It shall be unlawful for any person knowingly to sell or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles *may* examine and peruse [harmful to juveniles material]." Virginia Code § 18.2-391 (a) (emphasis added).

Court of Virginia narrowed definition of obscenity by judicial construction); *see also Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 90-91 (1965)(although the literal reading of the statute might well have made it overbroad, the State appellate court had considerably narrowed its scope by judicial construction). The Court of Appeals should have found that a Virginia court could narrowly construe the Amendment. *See New York v. Ferber; Broadrick v. Oklahoma.*

That the Fourth Circuit's expansive reading of the Amendment's language flies in the face of a facial overbreadth analysis and distorted the court's perception of the Amendment's potential for overbreadth is readily apparent in its rejection of Virginia's suggested modes of compliance with the provision. The court placed great emphasis on the Amendment's failure to provide specific methods of compliance, concluding that a retailer cannot tell which methods of display might be lawful or unlawful. *Booksellers*, 802 F.2d at 696. But this Court found in *Flipside* that such an argument confuses the vagueness and overbreadth doctrines, stating:

> If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. *We find that claim unpersuasive in this pre-enforcement facial challenge.*

455 U.S. at 497 n.9 (emphasis added). So long as it is clear what a display statute makes illegal, the provision need not spell out what a retailer must do to comply with it. This is left to the business policies the retailer chooses to adopt. *See Capitol News Co., Inc.* v. *Metro Gov't, etc.*, 562 S.W. 2d 430, 433 (Tenn. 1978).

Although the Fourth Circuit expressed concern over the Amendment's lack of express methods of compliance, it also found that including specific modes of compliance could not save an "offensive 'display' provision." 802 F.2d at 695 n.8 (J.S. at A-9). This paradox is a clear indication that the panel simply viewed any display provision as unconstitutional *per se* and puts its facial overbreadth finding in proper perspective.

D. THE AMENDMENT IS A VALID TIME, PLACE AND MANNER REGULATION

Virginia argued below that the Amendment is a valid time, place and manner regulation akin to that in *American Mini Theatres*. The Court of Appeals rejected this contention, finding that a "private" bookstore differs from a "public" place, and that time, place and manner regulations cannot involve the content of the regulated speech. 802 F.2d at 695 (J.S. at A-8). Neither of the court's conclusions is valid.

The first distinction is easily disposed of: while a bookstore might be privately owned, it is still open to the public; a bookstore is no more "private" than the theatres in *American Mini Theatres* or *Renton v. Playtime Theatres, Inc.*, ___ U.S. ___, 106 S. Ct. 925, 89 L.Ed2d 29 (1986).

With regard to the lower court's second point, of course it is true that the Amendment involves the "content of the regulated speech" in the sense that to be subject to the Amendment's requirements the material's content must be "harmful to juveniles." But this is no different than the theatres in *Playtime Theatres* being subject to Renton's ordinance because of the content of the movies they showed. The point is that the Amendment does not attempt to regulate the content of the speech: it simply requires that the speech be displayed in a manner so as to avoid harming children. In *American Mini Theatres*, Justice Stevens stated for the plurality that the First Amendment does not foreclose a State's right to prohibit the exhibition of pornographic material to juveniles, even though it is "clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area." 427 U.S. at 69-70.

Contrary to the Fourth Circuit's analysis, the appropriate inquiry is "whether [the provision] is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Playtime Theatres*, ___ U.S. at ___, 106 S.Ct. at 930, 89 L.Ed2d at 39. The Amendment clearly satisfies both parts of this test: as previously discussed, minors' access laws admittedly serve legitimate and compelling state interests; and Virginia's display provision leaves open ample alternative channels of communication. Compliance with the Amendment would not affect ultimate adult access to

materials obscene for juveniles, and any effect on adult speech is unintended and minimal. Indeed Virginia's display provision is less intrusive than the ordinances involved in *Playtime Theatres* and *American Mini Theatres* because any speech it affects is limited to a specific and circumscribed form of pornography.

In his *American Mini Theatres* concurrence, Justice Powell stated: "We have here merely a decision by the city to treat certain movie theatres differently because they have markedly different effects upon their surroundings. ..." 427 U.S. at 82 n.6. The same is true of the Amendment: the Court has here merely a decision by the General Assembly of Virginia to treat the display of certain material differently because of its recognized harmful effects upon children. Virginia's display provision is just as valid a time, manner and place provision as the ordinances upheld by this Court in *American Mini Theatres* and *Playtime Theatres*.

CONCLUSION

Virginia's 1985 juvenile access amendment clearly serves compelling State interests. It is not substantially overbroad on its face, sweeping no absolutely protected expression within its ambit. Even if it were, narrowing constructions are readily available to Virginia courts if the need ever arises. Given the Plaintiffs' contrived, preemptive attack on this legitimate statute without the existence of an actual case or controversy, the facial invalidation of this important provision would be, as this Court said in *Ferber*, "draconian indeed." 458 U.S. at 772 n.27.

This court recently quoted with approval Justice Powell's observation in *American Mini Theatres* that, "even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the

degree to which its special and overriding interests are implicated." *Playtime Theatres*, ____ U.S. at ____, 106 S. Ct. at 930, 89 L.Ed.2d at 39. *Ginsberg v. New York* was one such case. Surely, this is another. The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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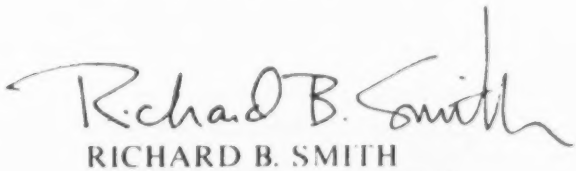
Attorney General of Virginia



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April 20, 1987

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
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No. 86-1031

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,
APPELLEES

On Appeal from the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE APPELLEES

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60 pp

QUESTIONS PRESENTED

The Commonwealth of Virginia imposes criminal penalties on sellers of books and periodicals if they display materials that are deemed "harmful" to juveniles, but that are constitutionally protected as to adults, in a manner whereby juveniles may examine and peruse them. The questions presented are:

1. Whether the Virginia statute, which sharply restricts adults' access to books and periodicals that they have a constitutional right to peruse and buy, violates the First Amendment.

2. Whether bookstores, and trade associations representing sellers, publishers, and distributors of books and magazines, have standing to bring a pre-enforcement challenge to the Virginia statute.

PARTIES TO THE PROCEEDING

The appellants in the court of appeals were the Commonwealth of Virginia and William K. Stover, Chief of Police for Arlington County. The Commonwealth of Virginia is the only appellant in this Court.

The appellees in the court of appeals, all of whom are appellees in this Court, were:

The American Booksellers Association, Inc., the major national trade association of booksellers. The Association has approximately 4000 members, including chain bookstores, private bookstores, and department store bookstores. Its members account for more than 80% of all sales of books of general interest by bookstores nationwide. The Association has members located in Virginia, including appellees Books Unlimited, Inc. and Ampersand Books.

The Association of American Publishers, Inc., the major national trade association of publishers of general books, textbooks, and educational materials. The Association has approximately 300 members, consisting of most of the major commercial book publishers in this country, and many smaller and non-profit publishers, including university presses and scholarly associations. The books published by the Association's members are sold throughout the United States, including Virginia, at bookstores, department stores, supermarkets, drug stores, newsstands, and other outlets.

The Council for Periodical Distributors Associations, the national trade association for more than 400 independent local wholesale distributors of magazines, paperback books, and newspapers. Its members are located and do business in every state of the United States, including Virginia.

The International Periodical Distributors Association, Inc., the national trade association for the principal pe-

riodical distributors. The Association's members are engaged in distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the country for ultimate distribution to retailers and the public in every state in the United States, including Virginia.

The National Association of College Stores, Inc., a trade association comprising approximately 2600 college and university bookstores located throughout the United States, including Virginia. Its members represent more than 95% of the higher education retail market for books.

Books Unlimited, Inc., a general retail bookstore located in Arlington, Virginia.

Ampersand Books, a general retail bookstore located in Alexandria, Virginia.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1034

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL., APPELLEES

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE APPELLEES

STATEMENT

This case is about freedom of speech in its most fundamental aspect—about the right of the people to display and sell, and to peruse and buy, books and magazines and newspapers. It raises the question whether government is free to impose severe new restrictions on the rights of adults to have access to expressive materials that may be deemed "harmful" to some children.

At issue is the constitutionality of a Virginia statute that imposes criminal punishment on sellers of books and periodicals if they display materials that contain "explicit and detailed" accounts of sexuality, and that are deemed by the statute to be "harmful to juveniles," in a manner "whereby juveniles may examine and peruse" them. Violation of this provision is a Class 1 misdemeanor punishable by a one-year term of imprisonment and a fine of $1000. Va. Code §§ 18.2-11, 18.2-391(e). Appellees, who are or represent sellers, publishers, and distributors of books, magazines, and other printed matter, challenged the statute under the First and Fourteenth Amendments. Both courts below agreed

with appellees that the statute is unconstitutional and enjoined its enforcement.

A. The Virginia Statute.

Since 1970, following this Court's decision in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Commonwealth of Virginia has made it a criminal offense "knowingly to sell or loan to a juvenile" sexually explicit materials that are deemed to be "harmful to juveniles" as defined by statute. Va. Code §§ 18.2-390 and 391. Effective July 1, 1985, the State amended this statute by adding a provision that makes it a crime "to knowingly display [such materials] for commercial purpose in a manner whereby juveniles may examine or peruse [them]." Va. Code § 18.2-391(a).

The Virginia juvenile display statute covers a broad range of expressive materials. It applies to "[a]ny book, pamphlet, magazine, printed matter however reproduced, or sound recording" that contains explicit depictions or descriptions of sexual conduct and that, taken as a whole, is "harmful to juveniles." Va. Code § 18.2-391(a)(1), (2). The phrase "harmful to juveniles" is defined to mean "that quality of any description or representation, in whatever form, * * * [that] (a) predominately appeals to the prurient, shameful or morbid interest *of juveniles*, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material *for juveniles*, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value *for juveniles*." Va. Code § 18.2-390(6) (emphasis added). A "juvenile" is defined as anyone under 18 years of age. Va. Code § 18.2-390(1).

The Virginia juvenile display statute is, therefore, by no means limited to what the State and its amici call "pornography," or "calculated purveyance of filth," or "X-rated materials," or "indecent literature," or "dirty books." See Va. Br. 9, 19, 30; Minn. Am. Br. 19-20; Inst. Youth Adv. Am. Br. 11; NLF Am. Br. 1, 9. In-

deed, there is no dispute in this case about the power of the states to prohibit both the display and the sale, to adults and children, of hard-core pornography that meets the constitutional standard of what is obscene. Rather, the Virginia statute sweeps within its coverage a wealth of both serious and popular literature that adults have a clear constitutional right to buy but that could be viewed as unfit for children (especially younger children) under "prevailing standards in the adult community" because of sexually forthright scenes or themes. In particular, our contemporary literature has, ever since Joyce and Lawrence, been strongly committed to the candid depiction of the erotic as an essential element of reality. Modern fiction, from Proust and Hemingway to Genet and Philip Roth, contains frequent depictions of sexual conduct, some of it vivid and even disturbing. And a great many non-fiction works, especially in the fields of health, science, and human relations, also deal forthrightly with sexual subjects.

Given the breadth of this coverage, the 1985 amendment imposed a severe new burden on establishments selling books and magazines within the State.[1] The prior statute had prohibited the *sale* of a particular book to a particular juvenile if the bookseller had reason to believe that the book lacked serious value for that child and would instead simply appeal to his prurient interests. That version of the statute itself imposed a difficult task on the bookseller, who had to make a quick on-the-spot judgment about the appropriateness of a given book or magazine for a juvenile of that age and maturity. But the task was at least a manageable one, involving a rough judgment whether a specific item should be sold to a specific youth. In contrast, the amended statute requires booksellers in advance to ensure, on pain of criminal penalties, that no books, pamphlets, or magazines

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[1] Books and magazines are sold today not only in traditional bookstores, but also—and, in some locations, primarily—in supermarkets, drugstores, etc. For convenience, in this brief we often refer to "booksellers" to describe all such retailers.

meeting the vague standard of "harmful to juveniles" are *available* anywhere in the bookstore where any juvenile "may examine and peruse" them. And in determining whether a particular book on display would be considered "harmful to juveniles," the bookseller is forced to apply the statutory test in the hypothetical context of the youngest and least mature browser.

Accordingly, a conscientious bookseller wishing to be certain to abide by the 1985 amendment to the Virginia statute must engage in rigorous self-censorship in one of three ways: (a) he can eliminate from inventory all books and magazines, no matter how clearly important and serious (and no matter how clearly comprising material that adults have a constitutional right to peruse and buy) that might, because they include sexual depictions, be viewed as "harmful" to the youngest juvenile; (b) he can display such books and magazines in "adults only" sections of the bookstore or put other severe restrictions on access to them; or (c) he can exclude children entirely as customers (perhaps by "carding" all customers, as is done in bars).[2] These alternatives, however, would dramatically reduce the availability of constitutionally protected books and periodicals and would have a severe adverse effect on the bookseller's business.

B. The Litigation.

1. On July 16, 1985, appellees filed this action in the United States District Court for the Eastern District of Virginia to challenge the validity of the 1985 display statute under the First and Fourteenth Amendments.[3] Appellees contended that it was "not possible, under the terms of the [1985] Amendment, to restrict the display of materials covered by the Amendment to juveniles without also restricting such access by adults" (J.A. 17).

---

[2] Some of these options are of course not meaningfully available to outlets such as newsstands and grocery stores.

[3] The suit was originally brought against local officials. The Commonwealth of Virginia intervened in the suit as defendant and is now the only party appellant.

Appellees charged that the statute "effectively requires booksellers to remove from their shelves substantial amounts of * * * constitutionally protected matter, thereby restricting the right of adult customers to view, peruse and purchase protected literature" (J.A. 17-18). Appellees further claimed that the statute violates the First Amendment rights of more mature juveniles, whose access to books is limited to the level appropriate for the youngest children (J.A. 18-19). Appellees also attacked the new statute as vague, because "the words 'display,' 'harmful to juveniles' and 'in a manner whereby juveniles may examine and peruse'" fail to "provide adequate notice of an offense under the Amendment" (J.A. 19).

Following an evidentiary hearing, the district court held the juvenile display statute unconstitutional (J.S. App. A15-A30). The court found that "the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are 'harmful to juveniles' as defined in the statute" (*id.* at A20); in the case of appellee Books Unlimited, for instance, "approximately 10-15% of its books may not be displayed under the new law" (*ibid.*). Books that fall within the display provision "come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health" (*ibid.*). Although some books and magazines are subject to the provision because of explicit photographs or pictures on their covers, "[m]ost of the[] books [that] come within the statute's fairly broad ambit [do so] on the basis of their content" (*ibid.*).

The district court also specifically found that ready access to books is "critical" to their sale to the reading public (J.S. App. A20):

> In all bookstores, the display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell. Customers often become familiar with a book, and desire to purchase it only after browsing

> and looking through the shelves. Customers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content.

Accordingly, at appellee Ampersand Books, for example, "at least one copy of every title carried * * * is on display" (*ibid.*).

The district court considered various means of complying with the juvenile display provision and found that none was practicable. First, bookstores could decline to carry any materials that fall within the statutory definition of "harmful to juveniles." However, since the statute extends to a substantial proportion of bookstores' inventory and applies to "a number of very popular books, including some best sellers, this alternative is not commercially feasible" (J.S. App. A21).

Bookstores could also refrain from publicly displaying these materials by keeping them behind the counter. However, "since the display of books is so crucial to their sale, such a move would substantially hurt sales" (J.S. App. A21). Furthermore, "due to the large number of books involved, this alternative would require bookstores to significantly alter the structure of their stores" (*ibid.*).

Alternatively, bookstores could create an "adults only" section in which to display such materials. This solution would generate its own problems, however, because "many adults would be reluctant and embarrassed to browse in an 'adults only' corner of the store, and sales of books placed in this new area would undoubt[ed]ly drop" (J.S. App. A21). Beyond that, because the juvenile display provision encompasses material in "a wide variety of literary disciplines, such as fiction, romance, photography, and best sellers[,] books which are 'harmful to minors' are mixed into so many different subject areas that it would be almost impossible for booksellers to sort through the books to create a new section" (*ibid.*). "An 'adult only' area would be costly to create, difficult to monitor, and would create a great deal of confusion in

the mind of a consumer searching for a particular book" (*ibid.*).

Finally, bookstores could attempt to exclude people under the age of 18. The district court found, however, that "such a move would create the impression that the store deals primarily in 'adult only' or pornographic material, which would have a devastating impact upon the store's business" (J.S. App. A21). And "this alternative would certainly have a dramatic impact upon the store's sales of children's books" (*id.* at A20-A21), which account for 10% of the business of appellee Ampersand Books and 40% of the sales of appellee Books Unlimited (J.S. App. A19-A20; J.A. 31, 65).

Based on these findings, the district court set forth its conclusions of law. The court first held that "case or controversy" and "standing" requirements were satisfied because "[t]he bookstores have adequately demonstrated a reasonable fear that the challenged amendment will be enforced against them, that the amendment raises substantial first amendment concerns, and that the amendment has caused and will continue to cause direct, immediate economic injury to their businesses" (J.S. App. A23). The court also concluded that "the significant first amendment questions raised by the plaintiffs' claims clearly make abstention inappropriate" (*id.* at A24).

On the merits, the district court held that the juvenile display provision was overbroad on its face and thus violated the First Amendment. Relying principally on *Butler* v. *Michigan*, 352 U.S. 380 (1957), the court stated that "[i]n promoting the morals of its youth by restricting their access to certain communications, the state may not create barriers which simultaneously place substantial restrictions upon an adult's access to those same protected materials" (J.S. App. A25). The court determined that the Virginia statute would have a crippling effect on adult readers and booksellers (*id.* at A26-A27 (citations omitted)):

> The level of discourse reaching commercial bookshelves cannot be limited to what might be appro-

> priate for an elementary school library. The state's purpose in passing the challenged amendment, however praiseworthy, cannot be pursued by means which effectively stifle an adult's access to communications he or she is entitled to receive. While the intended effect of the amendment is to prevent examination and perusal by minors of certain "harmful" materials, the unavoidable collateral effect of the law is to severely limit the ability of adults to examine these protected materials.

Thus, the inevitable consequence of the provision is "severely [to] limit[] sales to adults" and to impose compliance burdens for booksellers that are "commercially impractical" (*id.* at A27).

2. The court of appeals unanimously affirmed in all relevant respects (J.S. App. A1-A12). It first held that appellees had standing to challenge the 1985 amendment to the Virginia statute. The court recognized the dilemma that the statute created for appellees: "[i]f [appellees] attempt to comply with the amendment, they face economic injury; if [they] continue to conduct their business in their normal fashion, they face the prospect of prosecution" (*id.* at A5-A6). Noting that "[i]t would be unreasonable to assume that the [State] adopted the 1985 amendment without intending that it be enforced" (*id.* at A6 n.4), and emphasizing appellees' "legitimate concern that the amendment will be implemented so as to infringe on their first amendment right[s] * * *" (*id.* at A5), the court held that appellees did "not have to expose [themselves] to prosecution" in order to obtain a determination of the validity of the display provision (*id.* at A6).

The court of appeals also held that the statute was unconstitutional. It agreed with the district court that "book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale" (J.S. App. A9) and that the available methods of complying with the statute would "unreasonably interfere[] with the booksellers'

right to sell the restricted materials and the adults' ability to buy them" (*id.* at A10). Thus, the statute "discourages the exercise of first amendment rights in a real and substantial fashion, and * * * is not readily subject to a narrowing interpretation" (*id.* at A11). Finally, the court of appeals concluded that the display provision was not a valid "time, place, and manner" regulation because it was impermissibly based on the content of the materials (*id.* at A8).

SUMMARY OF ARGUMENT

This case presents a question that is fundamental to the existence of a free and informed society. The Virginia juvenile display statute—which requires bookstores and newsstands to reorganize themselves so that the only books and magazines that are readily accessible are those suitable for young children—greatly restricts the public availability of a vast range of materials, including numerous works of literature, popular fiction, and important nonfiction. By eliminating or severely limiting adult access to publications that may be unsuitable for juveniles but are constitutionally protected for adults, the Virginia statute violates the First Amendment.

1. Appellees have standing to challenge the validity of the Virginia statute. Booksellers are the direct and immediate objects of the statute and must take affirmative steps to comply with it: they are required to purge from their shelves all materials that the statute covers, to put such materials in an "adults only" section or conceal them behind the counter, or to exclude juveniles altogether from their stores. As the courts below found, given the enormous importance of easy accessibility for the sale of printed materials, compliance with the statute would have a devastating economic effect upon booksellers by reducing their sales and increasing their costs of doing business. Accordingly, appellees have suffered injury-in-fact that satisfies Article III requirements for standing. Appellees also have standing to contest the validity of the statute on behalf of readers whose First Amendment rights would be violated if appellees comply with the statute.

Further, this suit is not premature simply because prosecutions to enforce the statute have not yet been brought or threatened. It is the very existence of the statute, recently enacted by the Virginia General Assembly and available for enforcement at the discretion of local police and prosecutors, that creates an immediate deterrent to the exercise of constitutionally protected rights. If, on the merits, the statute is unconstitutional because it forces booksellers to self-censor the materials they make available to the adult public, pre-enforcement relief is necessary to redress that constitutional violation; for if booksellers comply with the statute, the State's position would completely preclude judicial review of the constitutionality of the statute notwithstanding its restraining effect on free speech.

Nothing in principles of justiciability or ripeness requires that booksellers be forced to choose between complying with an assertedly unconstitutional provision and exposing themselves to criminal prosecution. On the contrary, even in the absence of an impending or threatened enforcement action, this Court has allowed First Amendment challenges to statutes that caused an immediate injury to the plaintiff. Here, as in those cases, a real and concrete controversy is presented, and anticipatory relief is essential to the protection of First Amendment rights.

Nor do prudential principles counsel against appellees' standing. In particular, there is no merit to Virginia's veiled hints that the district court should have abstained. This Court has recognized that abstention is generally inappropriate in cases raising First Amendment challenges to state statutes on their face, because the delay involved in abstaining could itself result in the continued violation of constitutional rights. Abstention is especially inappropriate in this case, since the challenged statute cannot be meaningfully narrowed in a single proceeding and is not susceptible of a limiting construction that would obviate or simplify the federal constitutional issue. The basic prerequisites for abstention are therefore lacking.

2. The world of books and ideas, like life itself, is inextricably entwined with human passion and sexuality. Many serious and important works of literature, popular bestsellers and other modern fiction, and scientific studies in such fields as psychology and human behavior, contain sexually forthright materials that, while appropriate for adults, may be unsuited for some juvenile readers. It is these publications, constitutionally protected as to adults, that are threatened by the Virginia statute.

Contrary to the suggestion of Virginia and its amici, this statute is not necessary to the states' efforts to shield children from the *obscene* materials that the courts have identified as lying entirely outside the pale of the First Amendment's protections. Under *Miller* v. *California*, 413 U.S. 15 (1973), states are free to ban such materials for adults and juveniles alike. Nor is this case about "adult" bookstores; states may undoubtedly prevent juveniles from frequenting such establishments. Nor is this statute restricted to displays that call attention to the sexual nature of the materials or that hurl sexual images into the view of unsuspecting passers-by. Nor is it needed to prevent juveniles from *buying* sexually explicit publications that are inappropriate for their age and maturity; there is no dispute that states may prohibit such sales under *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

What this case *is* about is works of fiction and nonfiction, many of unquestionable worth and beauty, carried in ordinary neighborhood bookstores or other common outlets and maintained in the store in conventional commercial displays or on open shelves. In an effort to prevent the possibility that a juvenile might pick up a book and glance at a sexually revealing text or picture, the Virginia statute prohibits *all* booksellers in the State from displaying *all* such materials in *any* way that could be accessible to juveniles. Thus, to comply with the statute, booksellers must refrain from carrying these materials at all, must keep the materials either behind the

counter or in newly-created "adults only" sections, or must exclude juveniles from the premises altogether. As common experience indicates, and as the findings below fully demonstrate, these required methods of compliance would severely restrict the access of adults to constitutionally protected materials. Accordingly, the Virginia statute runs afoul of the fundamental First Amendment principle, consistently adhered to since *Butler* v. *Michigan*, 352 U.S. 380 (1957), that the state cannot erect legal barriers that confine adults to those materials that are appropriate for juveniles.

Virginia's display statute cannot be saved by this Court's decision in *Ginsberg* upholding a prohibition on sales to juveniles of sexually explicit materials that are not constitutionally protected for them. As the Court itself recognized in *Ginsberg*, sale provisions do not have a spill-over effect on adults; the only rights at stake in *Ginsberg* were those of juveniles, not adults. Moreover, a sale provision comes into play only when a juvenile seeks to purchase a book, so that the bookseller can make a specific (if rough) determination whether that particular publication is suitable for that particular minor; it does not require, as the display provision does, that the bookseller drastically alter his operations by reviewing his entire inventory and eliminating or secreting all materials that might be inappropriate for juveniles. Sale and display statutes therefore have a critically different impact on adult readers and booksellers. It is *Butler*, not *Ginsberg*, that provides the standard for judging the constitutionality of the Virginia juvenile display statute. Under that standard, the Virginia provision cannot stand.

ARGUMENT

VIRGINIA'S JUVENILE DISPLAY STATUTE VIOLATES THE FIRST AMENDMENT

A. Appellees Have Standing To Contest The Constitutionality Of The Virginia Juvenile Display Statute

Although Virginia did not attack appellees' standing in its jurisdictional statement, this Court's order noting

probable jurisdiction directed the parties "to brief and argue the question of appellees' standing." The State has responded by asserting that appellees lack standing to maintain this pre-enforcement challenge to the constitutionality of the juvenile display provision because they "simply failed to show a realistic chance of criminal prosecution to establish the existence of an Article III actual case or controversy" (Br. 14) and because "[a]ny claim of economic injury caused by compliance with the Amendment was founded only on the bookstore owners' misapprehension of what the statute requires" (Br. 15).

Virginia's submission constitutes, in effect, an attempt to turn the 1985 amendment's most profound vice—the immediate pressure that its broad and vague provisions place on booksellers to self-censor so as to avoid criminal prosecution—into an argument *against* any judicial scrutiny whatever of the statutory scheme. The State's position is inconsistent with settled First Amendment justiciability principles and, if accepted, would permit violations of the Constitution to go unchecked.

1. *Appellees Have Suffered An Injury-In-Fact That Satisfies Article III Requirements For Standing.*

Virginia contends (Br. 11-15) that there is no "case or controversy" before the Court under Article III because appellees have not suffered any "injury-in-fact" as a result of the juvenile display provision. Examination of the requirements of the Virginia statute and the record in this case shows that Virginia's argument is without merit.

a. The Virginia statute prohibits covered materials from being "knowingly display[ed] for commercial purpose in a manner whereby juveniles may examine and peruse" them. Thus, sellers of books, periodicals, and other publications are the express and immediate targets of the statute; it is against them that the display provision "directly operate[s]." *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).

In order to make certain that they are in compliance with the juvenile display provision, booksellers must take

"affirmative steps" (*Meese* v. *Keene*, 107 S.Ct. 1862, 1868 (1987)) to review their inventories and to modify their display and selling practices. As the court of appeals observed (J.S. App. A5), "[t]o avoid criminal liability, [appellees] must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful." These self-executing requirements, imposed immediately upon the effective date of the amendment, "constitute[] a cognizable injury in the course of" appellees' business of selling books and other materials to the public (*Keene*, 107 S.Ct. at 1868).

It is elementary learning that a claim under the First Amendment may be made by persons who are the direct objects of a statutory command that obliges them to curtail or end First Amendment activities. See *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972) (a claim of First Amendment violation may be raised by a plaintiff who is "either presently or prospectively subject to the regulations, proscriptions, or compulsions" of the challenged statute). Appellees include (or represent) sellers of books and magazines in Virginia whose normal practices in connection with the sale of books and periodicals are severely and immediately constrained and inhibited by the requirements of the Virginia statute. As the direct objects of these requirements, which obviously restrict appellees' own First Amendment activities, and which must be complied with forthwith on pain of criminal punishment, appellees surely have standing to contest their validity under the First Amendment.[4]

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[4] It has long been recognized that the First Amendment extends not only to the publication of books but also to their sale and distribution. See *Winters* v. *New York*, 333 U.S. 507, 509 (1948); *Smith* v. *California*, 361 U.S. 147, 150 (1959). As the Court remarked in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 65 n.6 (1963), the First Amendment "embraces the circulation of books as well as their publication." See also *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955 n.6 (1984).

For this reason, Virginia is incorrect in asserting (Br. 26-27) that appellees' dissemination of books and periodicals constitutes

b. Appellee booksellers also have standing to raise the First Amendment rights of their customers who would be deprived of free access to constitutionally protected materials if the juvenile display provision were to be obeyed. Since the Virginia statute imposes no duty or penalty on any reader who seeks to peruse or buy any book, it is doubtful whether adult customers who are deprived of such access would themselves have an appropriate form of action (or indeed the practical incentive) to challenge the validity of a statute that has caused compliant or fearful booksellers to hide certain books or remove them from their stores. As a result, "it is only * * * the bookseller who can protect * * * the central First Amendment concern * * * to maintain free access of the public to the expression." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 57, 77 (1976) (Powell, J., concurring).

It is hornbook law that if compliance with a statute would in itself entail a curtailment of another's constitutional rights, the person who is commanded to comply has "corollary" standing to contest the validity of the statutory command. See, *e.g.*, *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Craig* v. *Boren*, 429 U.S. 190 (1976); *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977); see generally Hart & Wechsler's Federal Courts and the Federal System, 184 *et seq.* (3d ed. 1973; 1981 Supp.). Indeed, "where the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims * * *." *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 957 (1984).

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commercial speech that is entitled only to limited First Amendment protection. See *Munson*, 467 U.S. at 955 n.6; *Smith*, 361 U.S. at 150. See also *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S.Ct. 2034, 2037 (1986).

c. Finally, the juvenile display provision will cause sellers (and, as a consequence, publishers and distributors) of books and periodicals substantial economic harm by limiting sales and increasing the costs of doing business.[5] The district court expressly found that compliance with the statute's broad and vague terms "would have a devastating impact upon [a] store's business" (J.S. App. A21) and would be "commercially impractical" (*id.* at A27). The court of appeals agreed, concluding that "compliance with the amendment threatens the [b]ooksellers with economic injury" (*id.* at A5) because they will "face a substantial problem * * * in ordering, reviewing, and displaying publications for sale" (*id.* at A9). These findings clearly establish sufficient "injury" to confer Article III standing. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. at 194; *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217 (1975).

2. *Virginia's Objections To Appellees' Anticipatory Challenge To The Statute Are Insubstantial.*

Virginia does not seriously bother to dispute most of the propositions discussed above. Rather, the State's arguments, while couched in terms of standing, really constitute general objections to pre-enforcement judicial review on grounds of justiciability or ripeness: the State contends that appellees "cannot conjure a case or controversy out of thin air where there is no credible evidence that some [appellee], somewhere, has previously violated, is currently violating or intends in the future to violate the Amendment" (Br. 14). This argument is wrong.

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[5] It is evident that, insofar as the juvenile display provision has an effect on the sale of books and other printed matter, it necessarily will have a corresponding impact on the publication and distribution of such materials. These economic losses suffice to confer standing on appellee publishers and distributors. And, as Virginia correctly acknowledges (Br. 14 n.2), appellee trade associations have standing to assert the rights of their members. See, *e.g.*, *International Union, UAW* v. *Brock*, 106 S.Ct. 2523 (1986).

The question here presented on the merits is whether Virginia's juvenile display statute unconstitutionally restricts the free speech rights of booksellers and adult readers. And in this case the same reasons that demonstrate that an unconstitutional restriction exists themselves demonstrate a compelling need for anticipatory relief. For, if the First Amendment is violated here, it is violated because the statute itself creates immediate pressure on bocksellers to impose unconstitutional restrictions on the access of adults to constitutionally protected books and magazines. But if that pressure is complied with, a refusal to provide anticipatory review will frustrate the possibility of any judicial review whatever; and the result will be the successful accomplishment of what—by hypothesis—is an unconstitutional restriction on freedom of speech.

This is, in other words, a case where issues of ripeness collapse into the issue on the merits, because an unconstitutional statute works a present restriction on First Amendment freedoms even though no official enforcement action may be pending or threatened. Even without an explicit threat of criminal proceedings, the fear of prosecution is a powerful deterrent to the exercise of constitutionally protected rights. If booksellers may not seek an immediate judicial determination of the validity of the 1985 amendment, they must either comply with what they believe to be its unconstitutional requirements, thereby relinquishing First Amendment rights and incurring substantial economic harm, or expose themselves to the devastating stigma and financial burden of criminal prosecution. (In the case of the two appellee bookstores—modest neighborhood businesses completely dependent on local goodwill—we are talking about the quite unacceptable risk of "police raids" followed by criminal prosecution for displaying "pornography" to children.) But if booksellers comply, the statute would exert all of its unconstitutional effects while remaining unchallenged and unchallengeable.

The danger in Virginia's approach is the danger of self-censorship. The possibility of criminal liability, cou-

pled with the fear of presure from vociferous groups in the community to comply with what is perceived as "pornography" legislation, will cause many booksellers to bite their tongues and obey the statute. Indeed, given the vagueness of the display provision, there is a serious danger of over-compliance, as booksellers err on the side of caution in determining whether books that may be sold to adults are "harmful to juveniles" or are displayed in a manner "whereby juveniles may examine and peruse" them. Thus the mere existence of the Virginia statute, on the books and subject to immediate enforcement at the discretion of local police and prosecutors, deters the exercise of constitutionally protected rights.

It is in just such circumstances that this Court has repeatedly held that, in order to establish standing in a First Amendment case, a plaintiff need not always expose himself to the risk of criminal prosecution. As the Court stated in *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974):

> [A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

See also *Erznoznik*, 422 U.S. at 217. In the First Amendment context, a delay in judicial resolution "might itself effect the impermissible chilling of the very constitutional right [plaintiff] seeks to protect." *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967). It is the contested "statute's very existence [that] may cause * * * [people] to refrain from constitutionally protected speech or expression." *Munson*, 467 U.S. at 957. See also, *e.g.*, *Houston* v. *Hill*, No. 86-243 (June 15, 1987), slip op. 15-16; *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940).

To be sure, in many cases a plaintiff does not bring suit to challenge a state statute until after he has at

least been threatened with prosecution. But a threat of prosecution is not an indispensable prerequisite to a federal court action: this Court has allowed pre-enforcement challenges to statutes that had an immediate impact upon the plaintiff, even in the absence of an explicit threat, because such review was essential to the protection of First Amendment rights. See, *e.g.*, *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 315 n.12 (1980) (per curiam); *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 301-302 (1979); *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 & n.10 (1976); *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 45 (1961); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 863-865 (1970); see also *Renton* v. *Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986) (pre-enforcement challenge to zoning statute under First Amendment); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (pre-enforcement challenge to obscenity statute under First Amendment).[6] Since under the Virginia display statute appellees must immediately "curtail their * * * [activities] and thus forgo full exercise of what they insist are their First Amendment rights," and since the State "has not disavowed any intention of invoking the criminal penalty provision" against them if they violate the statute (*Babbitt* v. *United Farm Workers*, 442 U.S. at 301-302), a justiciable controversy is presented.

It is not our position that there is an automatic right to pre-enforcement litigation of First Amendment claims. Plaintiffs may not simply "ma[k]e a search of state statutes and city ordinances with a view to picking out cer-

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[6] Even outside the area of free speech, the Court has permitted pre-enforcement challenges in a variety of circumstances. See, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51, 64 n.21 (1979); *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 81-82 (1978); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973); *Lake Carriers Ass'n* v. *MacMullan*, 406 U.S. 498, 507-508 (1972); *Epperson* v. *Arkansas*, 393 U.S. 97, 100-102 (1968); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925).

tain ones that they [think] might possibly be used by the authorities as devices for bad-faith prosecutions against them." *Boyle* v. *Landry*, 401 U.S. 77, 81 (1971). Nor may a plaintiff's standing be based on a risk of prosecution that is "chimerical" (*Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion)) or that lacks "even a remote likelihood" of being realized (*id.* at 505 n.9). See *Doe* v. *Bolton*, 410 U.S. at 188-189. That, however, in no way describes the situation here.

The 1985 juvenile display provision is a "recent" (*Doe* v. *Bolton*, 410 U.S. at 188) expression of the current public policy of the State, a policy that, according to Virginia itself, serves "weighty," "compelling," and "transcendent" state interests (see, *e.g.*, Va. Br. 9, 16, 23). The strict enforcement of "anti-pornography" legislation—particularly juvenile anti-pornography legislation —is forcefully favored by many politically vocal groups and is an attractive avenue of recognition for ambitious police and prosecutors. Under the circumstances, it would be foolhardy for a Virginia bookseller to violate this criminal statute on the theory that it will simply never be enforced; and Virginia's bland suggestion that there may never be enforcement (Va. Br. 6) cannot be taken seriously. The point was succinctly put by the court of appeals: "It would be unreasonable to assume that the General Assembly adopted the 1985 amendment without intending that it be enforced" (J.S. App. A6 n.4).

Virginia's argument (Br. 8, 15) that appellees' fears of injury are "irrational and illusory" because no appellee had ever been subject to prosecution under the prior statute is not persuasive. Booksellers *comply* with the pre-1985 statute because this Court upheld virtually identical provisions in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and because bans on sale (unlike display bans) can be effectuated without serious disruption of the bookseller's business (see pages 3-4, *supra* and 29-30, 36-37, *infra*). The fact that that statute has not gen-

erated criminal prosecutions is, therefore, completely irrelevant to the question whether a failure to comply with the 1985 amendment would or would not provoke criminal prosecution.

In sum, the prospect that the juvenile display statute would adversely affect appellees was by no means "imaginary or wholly speculative" (*Babbitt* v. *United Farm Workers*, 442 U.S. at 302) when this lawsuit was brought. As the court of appeals stated (J.S. App. A5), appellees "have shown a legitimate concern that the amendment will be implemented so as to infringe on their first amendment right[s] * * *." Appellees were therefore not barred from federal court to contest the constitutionality of the display provision simply because prosecutions under the statute had not yet been commenced or threatened.[7]

Virginia's other objections to appellees' "standing" under Article III are no more substantial. The State argues (Br. 12-13; see also *id.* at 16, 25, 27-29) that "there is nothing in the record to support" the findings of the district court on the coverage of the juvenile display provision and its effect on booksellers. The State has advanced no reason, however, for this Court to reexamine the findings of fact made by the district court and not disturbed by the court of appeals. See *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984). In any event, Virginia's presentation falls far short of showing that the district court's findings are clearly erroneous. Contrary to the State's suggestion (Br. 12, 13, 28), the district court was not required to make specific findings as to exactly which books in the inventory of appellee bookshops are covered by the display provision; a number of illustrative books were identified in testimony or

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[7] We note in this regard that courts routinely have allowed booksellers, publishers, and distributors to bring pre-enforcement challenges to juvenile display statutes. See, *e.g.*, *Upper Midwest Booksellers* v. *Minneapolis*, 780 F.2d 1389, 1391 n.5 (8th Cir. 1985); *American Booksellers Ass'n* v. *Webb*, 590 F. Supp. 677, 681 n.1 (N.D. Ga. 1984); see also cases cited in note 9, *infra*.

introduced in evidence (J.A. 47-51, 53-54, 57, 71-74, 77-81) and, based upon the definitions contained in the statute (J.A. 56), the court properly reached its findings for both the average bookstore in Northern Virginia and for appellees Books Unlimited and Ampersand Books.[8]

3. *Appellees' Claims Satisfy Prudential Standing Requirements.*

Virginia presents (Br. 16-17) a melange of so-called "prudential" reasons why the Court should deny appellees standing to challenge the juvenile display provision. Thus, the State contends that prudential standing turns on a balancing of the "minimal impact" of the display provision on bookstores and the "minuscule number" of books covered by the statute, on the one hand, against "Virginia's compelling interest in protecting the welfare of children" on the other. But these "balancing" arguments have nothing to do with standing. Insofar as the State contends that its interest in protecting minors outweighs the expressive rights of booksellers and adult readers, its contention goes to the merits of appellees' First Amendment claims.

Virginia also objects to appellees' so-called "contrived preemptive strike" against its statute, on the ground that this constitutes a "serious attack[] on State sover-

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[8] Virginia also emphasizes (Br. 13, 15, 27) that appellees' witnesses apparently did not possess a comprehensive and expert acquaintance with the details of the Virginia statute and were unaware of the statutory definition of "harmful to juveniles." However, although the witnesses were not entirely certain of the materials covered by the juvenile display provision, in large part because of the breadth and vagueness of the 1985 amendment (J.A. 26, 30, 56, 61, 74), they made it clear that they had a general understanding of the statutory terms and of the drastic effect the statute would have on their methods of operation (J.A. 41, 42, 47-51, 52-54, 55, 57, 69-74, 79-81). In any event, the district court's findings of fact were based on its independent assessment of the evidence in the case. Compare J.A. 27, 42, 70. That court was unquestionably aware of the definitions in the statute when it made its findings on the quantity and types of books that are encompassed by the 1985 amendment (J.A. 56).

eignty" and is in derogation of "basic principles of federal-state comity" (Br. 16-17). Again, it is not clear just what this has to do with appellees' standing to maintain this action. Is Virginia perhaps hinting that the federal court should have abstained from adjudication? Yet Virginia does not directly argue that abstention was required here, and it has not sought review of the district court's decision not to abstain (J.S. App. A24). See *Pennzoil Co.* v. *Texaco, Inc.*, 107 S.Ct. 1519, 1526 n.9 (1987) (declining to address abstention issue because "appellant has not argued [it] in this Court").

We nevertheless address the abstention issue in view of the vivid impression that may be created by the State's colorful language about "preemptive strikes." The important question, of course, is: just what did this "preemptive strike" preempt? What is it that would happen in the absence of this lawsuit that, while preserving "federal-state comity," would also secure the parties' federal constitutional rights?

Abstention is relevant in two situations: (a) where a state criminal or regulatory statute has been violated and a state enforcement proceeding is pending (or imminent), so that the federal plaintiff has a full and fair opportunity to litigate his federal claims by way of defense in that proceeding; or (b) where a state court proceeding can be brought to resolve antecedent state-law issues or generate a limiting construction of the state statute so as to moot (or at least narrow) the relevant issue of federal constitutional law. Neither of these exists here. No state-court enforcement proceeding is pending; indeed, the constitutional *problem* is that the very existence of this statute will force booksellers to forgo exercising their constitutional rights and comply (or even over-comply) precisely in order to prevent the possibility of a criminal prosecution.

Nor is this an apt setting for the second (so-called *Pullman*) sort of abstention. This Court has "been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment" (*Houston* v.

Hill, slip op. 15), because abstention "might itself effect the impermissible chilling of the very constitutional right [the plaintiff] seeks to protect." *Zwickler* v. *Koota*, 389 U.S. at 252; see also *Procunier* v. *Martinez*, 416 U.S. 396, 402 n.5 (1974).

In any event, in this case no plausible action can be brought in state court to avoid or narrow the coverage of the statute on antecedent state-law grounds. It has never been suggested that appellees might not be covered by the display provision; and, as we explain below (see pages 48-49, *infra*), the State has been unable to come up with an intelligible standard for narrowing the coverage of the statute. Where a statute is not "obviously susceptible of a limiting construction" (*Houston* v. *Hill*, slip op. 19), the essential prerequisite for abstention is missing. See *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237 (1984); see also *Board of Airport Commissioners* v. *Jews for Jesus, Inc.*, No. 86-104 (June 15, 1987), slip op. 6 ("it is difficult to imagine that the [statute] could be limited by anything less than a series of adjudications, and the chilling effect of the [statute] on protected speech in the meantime would make such case-by-case adjudication intolerable").

Accepting Virginia's general arguments against anticipatory review here would, in sum, simply create an opportunity for the State to play a game of cat and mouse—deciding for itself where and when to enforce the statute, but also allowing the statute to exert its full pressure on booksellers to self-censor in order to avoid prosecution. Abstention doctrines were not designed to give the government the power to deter First Amendment activities indefinitely by enacting a broad criminal statute inhibiting such activities and leaving police and prosecutors with broad discretion to enforce it, while at the same time aborting anticipatory challenges by hinting in appellate briefs that enforcement is unlikely.

A failure to adjudicate the validity of Virginia's juvenile display statute at this time would leave the First Amendment in limbo, with the State in full command of

the question whether and when to permit judicial scrutiny of the statute. No abstention doctrine requires such a perverse result.

B. The Virginia Juvenile Display Statute Violates The First Amendment By Substantially Restricting Adults' Access To Constitutionally Protected Materials

At stake in this case is whether ordinary bookshops (and other places where books and periodicals are sold: newsstands, supermarkets, drugstores, and convenience stores) must conduct their business in such a way that only those books and periodicals "appropriate for an elementary school library" (J.S. App. A26) are readily available to adults (and older juveniles) for browsing and perusal.

Although one might not know it from reading the briefs submitted by the State and its amici, this case is not addressed to the issue whether *obscene* materials can be kept out of the hands of children. Materials that meet the Constitution's standard for obscenity under *Miller* v. *California*, 413 U.S. 15 (1973), may be suppressed with respect to adults *and* children; and establishments that contain such materials ("adult" bookstores) may be placed entirely off limits to children. Thus the State has ample means to prevent children from having access to those materials that could be deemed to present the most serious danger to them.

This case is about a different category of materials entirely: books that comprise "a significant percentage" (J.S. App. A20) of the inventory of ordinary bookstores, just like the two neighborhood bookstores that are plaintiffs in this case. Nor is it about marginal or esoteric items within such bookstores. It is about serious works of literature, about popular bestsellers, about a diverse range of books of medicine, sociology, and psychology. (For example, Virginia conceded below (see C.A. Va. Br. 27-28) that the statute would cover Jackie Collins's *Hollywood Wives*, a popular work of fiction that was on the *New York Times* best seller list for more than six

months in 1983-84.) It is about any book or periodical that describes or depicts human passion and sexuality in a way that makes it unsuitable for a 10- or 12-year old.

It would seem clear, for instance, that Nabokov's *Lolita*, or William Faulkner's *Sanctuary* (with its powerful, and intentionally horrifying, scene of a sadistic rape), or Joyce's *Ulysses*, or Philip Roth's *Portnoy's Complaint*, are just the sort of books that are vulnerable to attack under the Virginia juvenile display law. They are books that might very well be characterized as appealing to the "morbid" and "prurient" interest of a youngster; and the adult consensus would surely be that they are unsuited to (and lacking in merit for) youths not yet in their teens.

What, then is a Virginia bookstore supposed to do about these works? For many years, it has been the law of Virginia that sexually explicit material may not be *sold* to juveniles; and if a child tries to buy a book with explicit sexual content, a sensible bookseller will tell him or her to run along. But the new Virginia statute does not address sales to minors. It forbids the *display* of the work in *any* way that has the effect of permitting a juvenile to "examine and peruse" it. The display does not have to be intrusive or explicit or prurient; the statute is in no way restricted to material that might present a blatant or inviting sexual image or message to a child passing by. It is violated as long as any juvenile can pick up the book and examine its contents.

Under the statute the Virginia bookseller must, therefore, do one of three things: he can eliminate *Lolita* and *Sanctuary* and *Ulysses* and *Portnoy's Complaint* from his inventory entirely. He can put them in a segregated "adult" section of the store (making it difficult and embarrassing for adults to examine them), or remove them from display and sell them only to customers who specifically ask for them. Or he can exclude all juveniles from the store entirely.

Our submission is simple: the First Amendment does not permit the State to put such heavy burdens on the

access of adults (or even of older juveniles) to a vast range of books and magazines solely on the ground that it would be unsuitable, because of their sexual content, for the youngest child to have access to them. Books and magazines are at the very heart of free speech. They are the sustainers of our intellectual and political and moral lives. Free trade in ideas requires free trade in books and periodicals. Serious obstacles to the ready availability of books and magazines represent a mortal danger to the ideal of a free and confident society.

1. *The First Amendment Prohibits A State From Limiting Adults To Books That Are Suitable For Children.*

This Court unanimously held three decades ago that the First Amendment does not allow a state "to reduce the adult population * * * to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383-384 (1957). In *Butler*, the state made it a criminal offense to sell or distribute to the general public sexually offensive materials that would have a "harmful" influence upon minors. The state defended the statute on the ground that it was "exercising its power to promote the general welfare" by "quarantining the general reading public" from such books in order to "shield juvenile innocence" (*id.* at 383). The Court rejected this argument, holding that the restriction on adult access to that which was suitable for minors "arbitrarily curtails one of those liberties of the individual * * * that history has attested as the indispensable conditions for the maintenance and progress of a free society" (*id.* at 384). To limit what adults can read in order to keep indecent materials from children, the Court stated, "[s]urely * * * is to burn the house to roast the pig" (*id.* at 383).

The Court consistently has adhered to the guiding principle of *Butler*. In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), for example, the Court held unconstitutional a state commission that restrained the "sale, distribution or display" (*id.* at 61) of books and magazines that were designated as objectionable for minors but

were not obscene for adults. Relying on *Butler*, the Court reasoned that although the commission's supposed concern was limited to youthful readers, its action invariably entailed the "suppression of the listed publications; adult readers are equally deprived of the opportunity to purchase the publications in the State" (*id.* at 71). In *Jacobellis* v. *Ohio*, 378 U.S. 184, 195 (1964), the Court reiterated that the legitimate state interest in protecting children from sexually explicit material "does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children'" (quoting *Butler*). And in *Pinkus* v. *United States*, 436 U.S. 293 (1978), the Court again relied on *Butler* in holding that the relevant "community" for deciding whether material is obscene for adults may not include children; even though the inclusion of minors in that standard would "not have an effect so drastic as the *Butler* statute," nevertheless "a jury conscientiously striving to define the relevant community of persons * * * would reach a much lower 'average' when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults" (*id.* at 298).

The Court most recently reaffirmed the *Butler* principle in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which invalidated under the First Amendment a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. The government defended the statute on the ground that, by limiting the availability of this material to minors, it assisted parents' efforts to control the manner in which their children became informed about sensitive subjects such as birth control. Although accepting that this interest was substantial, the Court held that it did not justify the statute's inhibition on freedom of speech (*id.* at 73-74):

> This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously

> made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population . . . to reading only what is fit for children" [quoting *Butler*]. The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

See also *id.* at 79 (Rehnquist, J., concurring in the judgment); *Wilkinson* v. *Jones*, 107 S.Ct. 1559 (1987), aff'g 800 F.2d 989 (10th Cir. 1986) (invalidating state cable television statute intended to protect children from "indecent material").

The State argues (Br. 9, 18, 25, 32) that *Butler* is inapplicable here because the display provision—even if it has a significant effect on adults—does not altogether "prohibit" adult access to covered materials and does not deny adults "ultimate access" to the materials. But, as *Youngs Drug* makes clear, the First Amendment prevents the government from placing substantial roadblocks in the way of adult access to constitutionally protected books and periodicals even if such restrictions "fall short of a direct prohibition against the exercise of First Amendment rights" (*Laird* v. *Tatum*, 408 U.S. at 11) or limit "freedom of expression only incidentally" (*Schad* v. *Mount Ephraim*, 452 U.S. 61, 68 n.7 (1981)). See also *Erznoznik*, 422 U.S. at 211-212 n.8. Virginia, for example, surely could not ban the sale of all sexually candid (but non-obscene) materials in any bookstore and insist that such materials be purchased solely by mail, even though such a scheme might well reduce or eliminate juvenile access to "harmful" publications and would not "altogether bar" "ultimate access" by adults.

It is of course true that this Court held in *Ginsberg* v. *New York*, *supra*, that a state may prohibit the sale of sexually explicit material to minors even if the proscribed material is not "obscene" as to adults. We do not question the *Ginsberg* ruling here. The critical point, however, is that *Ginsberg* in no way qualified the principle of *Butler*, because the statute in *Gingsberg* had no spillover impact whatever on adults: it simply prohibited the

sale of certain materials *to juveniles*. The Court in *Ginsberg* itself recognized this distinction, stating that the New York statute did not prevent bookstores "from stocking the magazines and selling them to persons 17 years of age or older" (390 U.S. at 634-635).

The fact that a ban on sale to minors, unlike a ban on displays, has no spill-over effect on adults has a further important consequence: the injury to First Amendment interests from misapplication of the statute is immeasurably greater in the case of a display statute. If a bookseller mistakenly refuses to sell a book to a minor that in fact is not "harmful to juveniles," the damage is limited to that one person. But if a bookseller decides not to display a book or magazine because of an erroneous fear that it falls within the Virginia statute, the damage is suffered by every customer of the store.

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978), which Virginia invokes (Br. 20, 26), does not modify the general principle established by *Butler*. In *Pacifica*, the Court, relying in part on a concern for children in the listening audience, held that the First Amendment did not prevent the FCC from regulating a daytime radio broadcast that was indecent but not obscene in its use of filthy language. In reaching that "narrow[] * * * holding" (438 U.S. at 750), the plurality opinion emphasized that, of all forms of communication, broadcasting "has received the most limited First Amendment protection" (*id.* at 748). It pointed out that broadcasting has "established a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even those too young to read" (*id.* at 748, 749). In particular, the plurality noted, broadcasting exposes listeners—including children—to being "unexpected[ly]" confronted by indecent language "in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder" (*id.* at 748). See also *id.* at 759-760 (Powell, J., concurring). The plurality added that the FCC's "action does not by any means reduce adults to

hearing only what is fit for children" because of the adequacy of alternative means of dissemination (*id.* at 750 n.28 (citing *Butler*)). See also *id.* at 760, 762 (Powell, J., concurring).

Pacifica does not justify the Virginia display provision. As the Court recognized in *Youngs Drug*, 463 U.S. at 74, *Pacifica* cannot be extended beyond "the special interest of the Federal Government in regulation of the broadcast media" and "does not readily translate into a justification for regulation of other means of communication." Virginia's display statute seeks to regulate just such an "other means of communication"—one that is utterly different from broadcasting. The display of books and magazines in bookstores and newsstands is not, like broadcasting, a licensed activity that is subject to pervasive governmental regulation and supervision. The Virginia display statute cannot be defended as a protection of unwitting parents and children against the unexpected invasion of the home (in daytime hours) by unsolicited and unwanted indecent language. And, unlike the regulation at issue in *Pacifica*, the Virginia statute fails to leave open adequate alternative means of adult access to constitutionally protected materials.

In sum, the First Amendment imposes a fundamental limitation on a state's power to act for the purpose of protecting minors from sexually explicit (but non-obscene) materials: it may not use a method that substantially infringes the rights of adults to have access to books and other materials that they have a constitutional right to peruse. As both lower courts held, it is just that limitation that Virginia's display provision violates.

2. *Virginia's Juvenile Display Statute Impermissibly Restricts Adults' Access To Constitutionally Protected Materials.*

There is no doubt that Virginia's display statute imposes severe restrictions on adult access to books and other materials that are constitutionally protected. That is why every court that has considered the constitution-

ality of juvenile display provisions, whether ultimately upholding or invalidating the particular statute, has recognized the substantial effect that such provisions have on the availability of books and periodicals for adults.[9]

The Virginia statute prohibits the "display" of covered materials "in a manner whereby juveniles may examine and peruse [them]." It is the display itself—wholly apart from any actual examination or perusal by any juveniles—that is proscribed. The display itself need not

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[9] A number of courts have struck down juvenile display provisions under the First Amendment. See *American Booksellers Ass'n* v. *Webb*, 643 F. Supp. 1546, 1548, 1553 (N.D. Ga. 1986) (statute "imposes an unreasonable burden on the First Amendment rights of authors, publishers, booksellers, and adult readers" and "unduly hampers an adult's access to protected expression"); *Rushia* v. *Town of Ashburnham*, 582 F. Supp. 900, 904 (D. Mass. 1983) (statute "necessarily prevents perusal by, and limits sale to, adults"); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50, 53, 56 (N.D. Ga. 1981) (the statute's "effect * * * is to deny adults as well as minors access to communicative materials" and "infringes on the protected rights of adults"); *Hillsboro News Co.* v. *Tampa*, 451 F. Supp. 952, 954 (M.D. Fla. 1978) (statute "necessarily limit[s] display to adults of only such books and printed materials as are fit for display to children, thus depriving adults of material that is protected as to adults"); *American Booksellers Ass'n* v. *Superior Court*, 181 Cal. Rptr. 33, 38 (Ct. App. 1982) ("it appears inescapable that by placing the publications outside the reach of minors they will also be placed outside the reach of many adults," thus "deny[ing] access to adults as well as to children"); *Tattered Cover, Inc.* v. *Tooley*, 696 P.2d 780, 784 (Colo. S. Ct. 1985) ("the state cannot prevent adults from reading or having access to these materials on the ground they would be objectionable if read or seen by children"); see also *Calderon* v. *Buffalo*, 402 N.Y.S. 2d 685 (App. Div. 1978).

Even courts that have sustained some form of juvenile display provision have recognized the adverse effect of such statutes on adults' access. See *Upper Midwest Booksellers* v. *Minneapolis*, 780 F.2d 1389, 1394, 1395, 1397 (8th Cir. 1985) (statute prohibiting display except in a blinder rack or sealed wrapper); *MS News Co.* v. *Casado*, 721 F.2d 1281, 1288, 1289 (10th Cir. 1983) (statute prohibiting display except in a blinder rack); *American Booksellers Ass'n* v. *Rendell*, 481 A.2d 919, 941 (Pa. Super. Ct. 1984) (statute, as construed, prohibiting ostentatious showing that emphasized or advertised the nature of the materials).

be explicit or prurient or ostentatious, or in any way call attention to the sexually explicit nature of the materials. (In this respect the Virginia statute differs sharply from the statutes of a number of states that prohibit the display of sexually explicit magazine and book *covers*.[10]) It is enough to constitute a crime under Virginia law that a book deemed "harmful to juveniles" can be found on a bookstore's open shelf.

It is the extreme breadth of Virginia's statute that ensures that its impermissible spill-over effects on adults will be substantial. The statute encompasses "*any* book, pamphlet, magazine, printed matter however reproduced, or sound recording" that contains "explicit and detailed" accounts of sexual conduct that may be "harmful to juveniles." This statute is, therefore, emphatically not directed only to explicit picture magazines with no editorial content; it covers textual descriptions of human passion and sexuality—and that of course is why many books on any reading list of a course on modern American (or French or English) literature constitute potential candidates for coverage.

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[10] In contrast to Virginia, seven states prohibit the display to juveniles of sexually explicit materials unsuitable for minors that are on the cover of (or otherwise visibly displayed in) books and magazines. See Me. Rev. Stat. Ann. tit. 17, § 2912 (1983 & 1986 Supp.); Miss. Code Ann. § 97-5-27 (1986 Supp.); Mont. Code Ann. § 45-8-202 (1985); N.C. Gen. Stat. §§ 14-190.13 and .14 (1986); N.D. Cent. Code § 12.1-27.1-03.1 (1985); 18 Pa. Cons. Stat. Ann. § 5903 (1983); Vt. Stat. Ann. tit. 13, § 2804b (1986 Supp.). (Several other states have statutes prohibiting visible displays and also have broader display statutes like Virginia's, see Fla. Stat. Ann. § 847.0125 (1987 Supp.); La. Rev. Stat. Ann. § 14:91.11 (1986); N.M. Stat. Ann. § 30-37-2.1 (1985 Supp.); R.I. Gen. Laws § 11-31-10 (1986 Supp.).) In addition, a number of states prohibit displays (whether to adults or juveniles) of sexually explicit materials that are publicly visible from outside the bookstore. See, *e.g.*, Miss. Code Ann. § 97-5-29 (1986 Supp.); Mo. Ann. Stat. §§ 573.010(14) and .060 (1979); N.J. Stat. Ann. § 2C:34-4 (1982); N.Y. Penal Law § 245.11 (1987 Supp.); 18 Pa. Cons. Stat. Ann. § 5903 (1983); S.C. Code Ann. §§ 16-15-290, 390 (1985).

The statute also defines "juveniles" with extreme breadth: *any* "person[s] less than eighteen years of age." Va. Code § 18.2-390(1). The statute thus forbids the display of any materials that would be unsuitable for a 10-year-old, even though they would not be inappropriate for a 17-year old (let alone for an adult). For this reason, the display provision violates the First Amendment rights of older juveniles as well as adults. The statute limits the access of older minors to materials that are not "harmful" for their age groups and therefore are constitutionally protected as to them. See *Youngs Drug*, 463 U.S. at 74 n.30; *Erznoznik*, 422 U.S. at 212-214 & n.11.[11]

The Virginia display statute's standard of "harmful to juveniles" is, further, so vague and unmanageable in the display context that booksellers, fearful of criminal sanctions, will keep a wide berth in determining whether a particular book or magazine may be displayed, thereby broadening the sweep of the statute in practice. See *Smith* v. *California*, 361 U.S. 147, 153-154 (1959). It is hard enough to apply the three-part *Miller* test to decide whether a particular book is or is not obscene; it becomes even more difficult when the task is to decide whether a book that is not obscene for adults nonetheless lacks "serious literary, artistic, political or scientific value" for a child. And that difficulty is in turn compounded when the standard has to be applied, not to a single book at the point of sale, but to the bookstore's entire inventory as applied to a hypothetical composite juvenile.[12]

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[11] The court of appeals "question[ed] whether an older minor's first amendment rights can be limited by the standards applicable to younger juveniles. * * * While the pre-amendment statute allowed retailers to consider a minor's relative maturity in deciding whether to sell a particular item to him, the current statute's display provision is not susceptible to such a selective application" (J.S. App. A7 n.7).)

[12] The typical bookstore relies on its distributors not to ship materials that are obscene as to adults. (In fact, retailers whose stock does not primarily consist of books and magazines are gen-

Finally, all of this must be visualized within the actual conditions under which the typical bookstore operates. New books flood in by the dozens each day; the clerks on hand barely have enough time to keep up with the sales slips and the shoplifters, much less read the new arrivals line by line looking for something that might be startling for young eyes. The temptation will be to take the easy way out and to refuse to display any books that arguably may be considered "harmful to juveniles."

The result of the statute is that an adult customer who wanders into a bookstore in Virginia will not find such materials on the shelves. It is true that an adult intent on buying a specific book can take the initiative and ask for it (assuming it has not been entirely eliminated from inventory), but that is not how the overwhelming majority of books and magazines are sold. As common experience demonstrates, the sale of books is heavily dependent upon browsing. Customers stroll the aisles, picking up books and periodicals whose title or dust jacket attracts their attention, thumbing through the volumes and reading selected passages, and eventually making impressionistic judgments whether or not to purchase. By prohibiting that practice in regard to a large number of constitutionally protected books and magazines, the Virginia statute has a devastating impact on central freedoms protected by the First Amendment.

This conclusion, grounded in common experience, is amply confirmed by the record in this case. The district court found that "[c]ustomers often become familiar with a book, and desire to purchase it only after browsing and looking through the shelves" (J.S. App. A20). Likewise, "[c]ustomers are generally hesitant about asking for help in locating books, and they are especially reluctant to ask for books that have a strong sexual content" (*ibid.*). To

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erally supplied by jobbers or wholesalers who unilaterally select the materials to be sold (J.A. 24).) That protection is not available, of course, in regard to books that can lawfully be sold to adults, and can perhaps even be sold to mature young adults, but cannot be displayed to "juveniles" as a class.

facilitate access, therefore, "at least one copy of every title carried by Ampersand Books is on display" (*ibid.*). "[T]he display of a particular book, and the manner in which it is displayed play a critical role in determining how many copies the bookstore will sell" (*ibid.*). The "unavoidable" consequence of the Virginia display provision is "severely [to] limit[ ] sales of [constitutionally protected books] to adults" by "severely limit[ing] the ability of adults to examine these * * * materials" (*id.* at A27).

Virginia's principal response to these problems (see, *e.g.*, Br. 9, 17-18, 24, 36) is the suggestion that the prohibition on display of sexually forthright materials is no different than—indeed, flows naturally from—the prohibition on sales to juveniles that this Court upheld in *Ginsberg*. But the argument overlooks fundamental differences between sale and display prohibitions. As noted above (see pages 29-30, *supra*), a prohibition on sales to minors has an impact only on minors; it has absolutely no impact on the rights of adults. On the other hand, limitations imposed on public displays of books have a major spill-over effect on adults. Consequently, prohibitions on display are inherently overbroad, extending well beyond the specific objective said to justify the statute.

Furthermore, a prohibition on sales to juveniles does not impose intolerable burdens on the bookseller, who need not interpret and enforce the prohibition until a minor seeks to make a purchase and presents himself at the counter with book in hand. At that point, the bookseller can take account of the nature of the material and the age and maturity of the individual in deciding whether the statute allows the sale of that particular book to that particular youngster. And whatever decision is made has no effect on the availability of that or any other book to adults or older juveniles.

Contrary to Virginia's suggestion (Br. 30), a bookseller's implementation of a display prohibition is not self-selecting and individualized. The statute imposes an

affirmative obligation on the bookseller not to display proscribed materials in a manner that permits juveniles to view them. Thus a display prohibition requires the bookseller immediately to review his entire inventory, make broad and abstract judgments about the suitability of books for juveniles of widely varying ages, and substantially alter the nature of his trade practices. These constraints unavoidably restrict adults' access to constitutionally protected materials and continually affect the bookseller's conduct of his business.

3. *There Are No Constitutionally Acceptable Methods For Complying With Virginia's Juvenile Display Statute.*

Virginia suggests that there are several ways for booksellers to comply with the statute that would avoid imposing unconstitutional burdens on adult readers and booksellers. The courts below correctly rejected the State's arguments, holding that the alternatives are themselves "unduly burdensome" on First Amendment rights (J.S. App. A10) and "commercially impractical" (*id.* at A27).

First, bookstores could comply with the display provision by refusing to stock any materials that might be "harmful to juveniles" under the statute. But that is precisely the result condemned by the First Amendment: "reduc[ing] the adult population * * * to reading only what is fit for children" (*Butler*, 352 U.S. at 383). In addition, as the district court found, this course is wholly unrealistic (J.S. App. A21). Because the juvenile display provision covers a significant percentage of the materials in a typical bookstore, including "very popular books" and "best sellers" (*id.* at A20-A21), the elimination of all such titles would be economically crippling.[13]

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[13] Booksellers would also find it difficult to restrict their orders of new books to materials not covered by the statute, because they

Second, bookstores could keep books considered "harmful to juveniles" behind the counter. But it would surely be a dramatic—and tragic—change in the "free traffic" in important and controversial books if prospective readers could find them only by asking specifically for a specific title, if the inveterate reader's custom of happening on books by serendipitous chance were simply eliminated. Ready access to freely displayed books is a crucial element in an active intellectual life concerned with books. And, as noted above, display of books is, as a practical matter, vitally important to their sale. To "force adults to use other means (beyond simply browsing through the shelves) to find out about protected literature" and to require them to ask to see a particular volume would "inhibit many individuals from exercising their right to examine and purchase the material" (J.S. App. A27; see also *id.* at A10).

This alternative, too, would present the bookseller with severe practical problems. Given the volume and diversity of books that are subject to the display provision, it would be virtually impossible for a bookseller to sort through his inventory to identify those items deemed "harmful" by statute. See *Smith* v. *California*, 361 U.S. at 153. Moreover, maintaining such books out-of-sight would require a fundamental and disruptive change in the physical layout (and the general ambiance) of bookstores.

Third, bookstores could create an "adults only" section for display of materials that might be "harmful to juveniles." But, even putting aside problems of book selection, store space, and monitoring, this alternative would do little to facilitate adult access, because many adults would be reluctant and embarrassed to browse in an "adults only" section, and "sales of books placed in this

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rarely have the opportunity to review books before ordering them (J.S. App. A21).

new area would undoubt[ed]ly drop" (J.S. App. A21; see also *id.* at A10).[14]

Fourth, bookstores could simply exclude youngsters from the premises. To turn general bookstores into "adult" establishments, however, "would create the impression that the store deals primarily in 'adult only' or pornographic material, which would have a devastating impact upon the store's business" because of the reluctance of most adults to patronize such a store (J.S. App. A21; see also *id.* at A10, A27). This "solution" also would have a dramatic impact upon the sale of children's books, which constitute a significant share of the business of many bookstores (see page 7, *supra*). And the blanket exclusion of minors would have a serious effect on their First Amendment right to buy and read materials that are suitable and constitutionally protected for them.

These intractable problems of compliance are especially pronounced with respect to booksellers such as newsstands, supermarkets, drugstores, and convenience stores (see J.A. 24). Non-bookstore vendors—the neighborhood Safeway—cannot realistically be expected to set up an "adults only" section or to exclude minors from the premises, since books occupy only a small portion of their floor space and account for only a small percentage of their total revenues. See *American Booksellers Ass'n* v. *Webb*, 643 F. Supp. 1546, 1553 n.15 (N.D. Ga. 1986). The probable effect of the Virginia statute is that outlets such as these will simply cease to carry any reading materials that might be covered by the statute or will dispense with

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[14] See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 86 (1960):

> To prohibit dealers from exhibiting within the view of adolescents books and magazines that can be sold only to adults would raise the additional problem of undue interference with the materials' primary audience. Beyond these obstacles is the disrupting effect of "adult only" counters or shelves in book stores and at newsstands * * *. To avoid these difficulties cautious dealers might well decide to abandon all books and magazines claimed by any one to be unsuitable for adolescents.

their book departments altogether. See *id.* at 1553; Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 86, 104 (1960). Yet many adults purchase their reading materials (especially paperbacks and magazines) in such establishments.

Fifth, Virginia speculates (Br. 29-30) that a bookseller can comply with the juvenile display provision by placing a color-coded "adults only" tag on books covered by the statute or by placing them in an "adults only" stand or blinder rack. But these steps would not satisfy the statute, which by its plain language prohibits the *display* of "harmful" materials and not simply their actual *perusal* by juveniles. As the district court stated, "[i]f the proscribed material is on a shelf in an area where juveniles are permitted to roam, then the item is 'on display' where the juvenile 'may' examine it even if the item is tagged" (J.S. App. A27). In fact, placing a warning tag on books and magazines or displaying them in special racks would not stop any determined juvenile from examining and perusing the materials; it is likely to have exactly the opposite result. See *id.* at A10.

In any event, even if the practices suggested by the State constituted compliance with the juvenile display provision, that would not solve the First Amendment problems presented by the statute. Labeling books as "adults only" or storing them in "adults only" racks would seriously inhibit adults from thumbing through and purchasing such materials. If the First Amendment is violated by requiring a general bookseller to become an "adult" bookstore or to establish a separate, cordoned-off, "adults only" section, it is equally violated by these other forms of "adults only" designations.

Undaunted by these difficulties, Virginia argues (Br. 30-31) that the scienter element in the display provision somehow renders the foregoing compliance alternatives

adequate to save the statute.[15] But the scienter element does nothing to relieve booksellers of the obligation imposed by the statute to review all the books they have or wish to stock in order to identify materials that are "harmful to juveniles." A bookseller who puts colored tags on his inventory or establishes an "adults only" section, for example, plainly could not claim a lack of scienter if he made no effort to evaluate the contents of his books and magazines before coding or displaying them. Nor does the scienter requirement ameliorate in any way the restrictions that Virginia's statute places on adult access to constitutionally protected books.[16]

What the State fails to appreciate is that it is the fear of prosecution and the pressure from organized groups in the community—not just the fear of a criminal conviction—that impel responsible booksellers to comply with statutes such as this. It is no answer to say that a bookseller charged with a violation of the statute will not be found guilty absent proof of scienter. The evil of the Virginia statute lies not in the spectre of jails filled with booksellers but in the reality of massive self-censorship, as booksellers struggle to take what the State calls "reasonable means" (Va. Br. 30) to restrict constitutionally protected books and periodicals from the view of children—and, necessarily, of adults as well.

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[15] In order to comply with this Court's decision in *Smith* v. *California*, *supra*, the Virginia statute provides that the display to juveniles must be made "knowingly" (Va. Code § 18.2-391(a)), which is broadly defined to mean "having general knowledge of, or reason to know, or a belief or grounds for belief which warrants further inspection or inquiry of * * * the character and content of any material described herein which is reasonably susceptible of examination by the [bookseller]" (Va. Code § 18.2-390(7)).

[16] It is in the context of *sales*, where the bookseller must make a judgment about the suitability of a single book for a juvenile of a given age and maturity, that the scienter requirement offers meaningful protection.

4. *The Juvenile Display Statute Cannot Be Justified As A "Protection Of Minors" Or A "Time, Place, And Manner" Restriction And Should Be Invalidated On Its Face.*

Virginia advances three reasons why the juvenile display provision should not be invalidated despite its severe spill-over effect on the availability of constitutionally protected materials to adults: (1) the display provision is justified by the state interest in shielding minors from sexually explicit books and magazines; (2) the statute is a valid "time, place, and manner" regulation; and (3) the provision is not substantially overbroad and can be narrowly construed, so that it is not invalid on its face even if it is susceptible of unconstitutional applications. These arguments afford no basis for salvaging the statute.

a. *The Display Statute Is Not Saved By The State Interest In Protecting Minors From Sexually Explicit Materials.*

The principal argument put forward by Virginia and its amici to support the juvenile display statute is that its restrictive impact on adult access to books and periodicals is justified by the State's overriding interest in "protecting children from exposure to pornography" (Va. Br. 9). Amicus City of Minneapolis states that the "[a]mendment helps prevent the knowing and commercial pandering to children of harmful material, patently and offensively appealing to or developing their prurient interest in sex without offering any ideas of serious value, contrary to the parent's instructions, educational efforts or wishes" (Br. 19-20). Amicus Institute for Youth Advocacy describes research that purports to support the conclusion that serious harm is done by the exposure of children to "X-rated materials" and "pornography" (Br. 9-12). Amicus National Legal Foundation stresses that "minors are exposed to obscene materials through public displays," that curiosity leads minors to

seek "access to obscene materials," and that "exposure to pornography" can cause harm to minors (Br. 12-15). It adds that "[i]t is well known that pornographic materials are used by adult pedophiles in seducing and conditioning children" (Br. 15) and that juvenile display statutes are based on the conclusion that "minors are harmed by exposure to obscene materials" (Br. 16).

We do not intend to denigrate the states' substantial interest in ensuring that children not be exposed to pornography and in controlling juvenile access to sexually candid materials unsuitable for minors. But there also exists a countervailing concern of fundamental constitutional import: the State must not be permitted to use its authority to place serious inhibitions on adult access to books and other expressive materials that are protected by the First Amendment. Both of these concerns have heretofore been sensitively accommodated by this Court's cases; that balance is drastically upset by Virginia's display statute.

i. It is absolutely critical to remember that the vast bulk of the materials that are called to mind by Virginia's and amici's references to "pornography" and "X-rated materials" and "obscenity," and the vast bulk of the materials referred to in the cited research, comprise hard-core materials that fall comfortably within the range of what the State is completely free to ban as "obscene" under the standards of *Miller* v. *California*, *supra*. It is *these* materials that are obviously at the heart of the State's concern to shield children from "harmful" depictions of sexuality. It is *these* materials that, this Court has concluded, are without value in the arena of free speech for adults *or* children, and that may therefore be entirely suppressed or—*a fortiori*—consigned to the shadow of the "adult" bookstore.

The overwhelming proportion of the State's interest in this field can be accomplished by vigorous enforcement of the concededly constitutional provisions that bar both

the sale and the display of true obscenity. What is left over is material that, by hypothesis, *has* value in the eyes of the First Amendment—that may, indeed, be work of the greatest possible beauty and importance—but that may be unsuitable for juveniles because of its depiction or description of sexual matters.

ii. Focusing, then, *on these materials alone*, we remind the Court again that there is no dispute here about the power of the State, under *Ginsberg*, to forbid the *sale* of explicit but non-obscene materials to juveniles. It is thus concededly the obligation of booksellers, at the point of sale, to make sure that juveniles do not buy books or magazines that are inappropriate to their age and maturity.

We submit that the State's power to prevent the sale of such materials to juveniles covers virtually all of the remaining territory where there exists a *serious* concern about harm to juveniles. What is left over? It is simply the possibility that a youngster will hang around in a bookstore—not an "adult" bookstore but an ordinary bookstore—and sneak a look at sexy passages in *Lady Chatterley's Lover* or *The Joy of Sex* or *Portnoy's Complaint*. Whatever minimal harm can come from such *transitory* exposure to works that are *not* obscene is surely outweighed by the policies of the First Amendment, which bars the State from imposing substantial roadblocks in the way of adult access to the perusal of constitutionally protected material. As the Court held in *Youngs Drug*, 463 U.S. at 73, a "marginal degree of protection" of juveniles does not justify substantial and sweeping restrictions on adult access. See also *Butler*, 352 U.S. at 383 (statute "quarantining" books from general public is "not reasonably restricted" to protection of juveniles even though materials sold to adults frequently find their way to juveniles, see, *e.g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 58 n.7 (1973)).

The Court's cases dealing with problems of juvenile access clearly recognize that the law cannot shield youngsters *entirely* from exposure to a huge variety of stimuli in our society, and that guiding children as they come into increasing contact with this adult world is one of the responsibilities of parenting. What the Court has made clear is that it is not permissible for a State to deal with this problem by the "preemptive strike" of trying to turn the adult world into a toy-park designed for kids. And that, precisely, is the chief vice of the Virginia statute, which requires bookstores and newsstands to reorganize themselves so that only books and magazines suitable for a 12-year old are readily accessible to adults.

iii. In any event, Virginia's juvenile display statute approaches the problem—if it is a problem—of transient juvenile access to non-obscene (but unsuitable) materials in a particularly heavy-handed and indiscriminate way. The Virginia provision is not restricted to displays that are prurient or salacious or might otherwise pander to the sexual curiosity of youngsters. It does not merely require—as some statutes do—that explicit covers be hidden behind blinder racks or paper wrappers.[17] It does not limit itself to the suppression of explicit materials that are thrust before unwitting and vulnerable youngsters. It sweeps broadly to encompass everything, including great works of literature, that may be inappropriate for children because of forthright sexual references.

Whatever power the State may possess to meet its narrow residual concern to prevent even the transitory exposure of youngsters to non-obscene materials that have some sexual content, that power may not be exercised by blunderbuss legislation that is "not reasonably restricted to the evil with which it is said to deal" (*Butler*, 352 U.S. at 383). For we stress again that the countervailing concern—the constitutional prerogative of adults to

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[17] See notes 9, 10, *supra*.

have ready access to the perusal of expressive materials even if they are unsuitable for children—is itself one of transcendent importance.

b. *The Display Statute Is Not A Valid "Time, Place, And Manner" Regulation.*

Virginia briefly asserts (Br. 38-39) that the juvenile display provision can be defended as a valid "time, place, and manner" restriction. That doctrine is designed to permit reasonable state regulation to ensure that First Amendment rights are exercised in a way—at a "time," in a "place," and in a "manner"—that is consistent with the general usage of the forum. It is the "nature of the place" and "the pattern of its normal activities" that determine whether a governmental restriction is a valid regulation of time, place, and manner; "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Schad* v. *Mount Ephraim*, 452 U.S. at 75.

The Virginia display provision is not of this stripe. The display of books can hardly be deemed "incompatible" with the "normal activity" of a bookstore. Nor can it be contended that the statute is based on any interest the State might have in regulating the "time, place, and manner" of these bookstore displays—as distinguished from the substantive interest it asserts in shielding juveniles from sexually explicit materials.

Time, place, and manner restrictions are in any event valid only if they operate "without reference to the content of the regulated speech" and "leave open ample alternative channels for communication of the information." *Clark* v. *Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984). See also, *e.g.*, *Jews for Jesus*, slip op. 3-4; *Youngs Drug*, 463 U.S. at 69 n.18. The Virginia statute fails on both scores. It is obvious that the statute is not content-neutral; application of the statute turns en-

tirely on the content-based determination that materials are "harmful to juveniles." Thus, "enforcement authorities must necessarily examine the content" of books and periodicals in order to decide whether they are subject to the restriction. *FCC* v. *League of Women Voters of California*, 468 U.S. 364, 383 (1984). And it is equally obvious, given the comprehensive coverage of the display provision, that it does not leave open "ample" means of adult access to covered books and magazines.[18]

c. *The Display Statute Is Invalid On Its Face And Cannot Be Saved By A Narrowing Construction.*

Virginia repeatedly insists on characterizing appellees' case as one that challenges the State's statute as "facially overbroad" (Br. 17; see also Br. 17-22, 24-25). It then uses this characterization to make a final effort to salvage the juvenile display provision by suggesting (Br. 34-37) that the statute, even if unconstitutional in certain applications, is subject to narrowing constructions and is not so substantially overbroad that it should be invalidated on its face. See *New York* v. *Ferber*, 458 U.S. 747, 769-770 (1982); *Erznoznik*, 422 U.S. at 216.

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[18] *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), cited by Virginia (Br. 38), are fully consistent with this conclusion. In those cases, the Court upheld local zoning ordinances for adult movie theaters that were based "not [on] the *content* of the films shown * * * but rather [on] the *secondary effects* of such theaters on the surrounding community." *Renton*, 106 S. Ct. at 929 (emphasis in original). The Court found that the ordinances were "unrelated to the suppression of free expression" within the theaters (*ibid.*); it was the "secondary effect which these zoning ordinances attempt[ed] to avoid, not the dissemination of 'offensive' speech" (*American Mini Theatres*, 427 U.S. at 71 n.34 (plurality opinion)).

The measures upheld in *American Mini Theatres* and *Renton* are a far cry from the juvenile display provision. The Virginia statute is directed at the content of covered materials; the State is concerned about the effect on readers themselves, not about the "secondary effects" of neighborhood bookstores on nonreaders. See *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 94 (1977).

It is not easy to pin down exactly what role the notion of "facial overbreadth" plays in this case. The First Amendment problem here is not that the statute encompasses two different types of activity, one that is constitutionally protected and the other that is not. Rather, it is that the very same activity—the display of books with a sexual content in general bookstores frequented by adults and juveniles—is constitutionally protected for adults but not for minors, so that the State's prohibition of displays accessible to minors necessarily infringes on the access of adults. This overbreadth cannot be cured simply by construing the statute in a way that excludes regulation of the constitutionally protected activity; in this context, such activity cannot be separated from that which is constitutionally unprotected.

Depending, then, on what is meant by "substantial overbreadth," there can be no doubt that the doctrine's requirements are either fully satisfied here or are irrelevant. The display statute is "substantially" overbroad because *every* time it causes a book to be removed from display in order to protect juveniles, the effect of the removal is to restrict the constitutionally protected access of adults to that book. See *Houston* v. *Hill*, slip op. 7. On the other hand, if the State's point is simply that the statute is unlikely to lead to the disappearance of many books that *juveniles* have a constitutional right to peruse, the proposition is irrelevant even if true.[19]

What is further apparent is that Virginia has not offered any plausible narrowing construction that would eliminate the unconstitutional burden that this statute places on adult access. Virginia keeps hinting that the statute will apply only to a very narrow category of

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[19] Its truth is certainly disputable, in two respects. The breadth of the statutory terms may easily lead to overcompliance, so that even texts suitable for all youngsters will, in an excess of caution, be purged from bookshelves. Second, the constitutional rights of older juveniles are surely invaded if books suitable for them but not for younger readers are removed.

books. But the State provides no *standard* whatever for restricting the wide sweep of the statutory language. See *Houston* v. *Hill*, slip op. 17-19 & n.18. Nor does the State tell us what reasonably expeditious procedures exist for obtaining this narrowing construction. All we have, instead, are vague promises that, if the matter is left to the State's tender mercies, all will be well because the statute will be narrowly enforced. But unchannelled discretion, left to police and prosecutors on the basis of ineffable criteria, to decide when and where to arrest and prosecute is emphatically not the equivalent of the possibility of a "narrow construction" that can save an overbroad statute from facial invalidation. See pages 23-25, *supra*.

The State specifically suggests that the lower courts erred in giving an unduly broad construction to the statutory terms "may" and "examine and peruse"; in the State's view, "may" should be interpreted to require "reasonable certainty," while "examine and peruse" should be understood to mean "inspect in detail" or "read * * * with great care" (Va. Br. 35-36 & nn. 9, 10). Given the weighty interests claimed to be served by the display statute, however, it would be quite artificial to apply it only where it was reasonably certain that juveniles could study "harmful" materials at length, and not to the more common situation where it could be foreseen that juveniles might pick up the materials and quickly (and probably furtively) scan them; a bookstore need not become a reading room in order to "display" materials in a way that juveniles "may examine and peruse" them.

In any case, the constitutional defect inherent in the Virginia statute does not hinge on the meaning of the words "may" or "examine and peruse." Even under the State's strained construction, bookstores would still have to organize themselves so as to make sure that juveniles do not find it possible, with "reasonable certainty," to inspect covered materials "with great care." But what

can this possibly mean? Surely, what it means is that bookstores may not allow any books that contain explicit passages to be displayed on the shop's open shelves—and that if they do so, they will have violated the statute. The State's verbal sleights-of-hand, therefore, do not amount to a meaningful narrowing of the impact of the statute on adults.

CONCLUSION

Until today, booksellers have been free to display their wares—hundreds of thousands of volumes, a multitude of periodicals—for perusal and browsing by all who are interested in the written word. That is what bookstores are, that is how they operate everywhere. We ask that this ancient and honorable tradition—so important to the life of the mind—be allowed to continue, and that Virginia's attempt to interfere with it be invalidated.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1987

Supreme Court, U.S.
FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

This case involves the facial validity of a Virginia statutory amendment barring the commercial display of pornography where children can examine and peruse it. The court of appeals' use of the facial overbreath doctrine to invalidate Virginia's display Amendment renders the State's authority to regulate the sale of such material to children meaningless, despite its validation by this Court in *Ginsburg* v. *New York*, 390 US. 629 (1968). *See American Booksellers Ass'n, Inc.* v. *Rendell*, 481 A.2d 919, 942 (Pa. Super 1984).

The decision below has also created a conflict in the federal circuits. *Compare Upper Midwest Booksellers* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S.*

News Co. v. *Casado*, 721 F.2d 1281 (10th Cir. 1983); (*See* Minneapolis Amicus Brief). And it has potential widespread impact on the numerous states and localities across the nation with display provisions of one form or another. (Georgia *et al* Amicus Brief).

ARGUMENT IN REPLY

Booksellers assert that there is no *Ginsburg* issue in this case, but their arguments consistently reveal that their real complaint is with *Ginsburg's* concept of "variable obscenity," not with Virginia's amendment. They argue, for example, that the Amendment completely bars all pornographic material not fit for children, thus violating the rule of *Butler* v. *Michigan*, 352 U.S. 380 (1957). This same argument was advanced in *Ginsburg* and rejected. 390 U.S. at 634.

They also contend that Virginia's display provision "presumes" that whatever is harmful for a young child is also harmful for an older one, but the Amendment has nothing to do with what is "harmful" for *any* child: "harmful to juveniles" is defined in Va. Code § 18.2-390, not the Amendment. This fifteen year old statute tracks the language validated in *Ginsburg*. Once again, the Appellees' argument is with the variable obscenity doctrine, not the Amendment.

Booksellers' further contention that the Amendment is violated by just having proscribed material in a store is simply rhetoric: the Amendment's scienter requirement makes a merchant liable only if she *knowingly* places such material where a child can *examine and peruse* it; if the pornography is not so knowingly placed, the Amendment is not violated. Virginia recognizes that "[i]t is not innocent

but *calculated* purveyance of filth which is exorcised. . . ." *Ginsburg*, 390 U.S. at 644.[1]

Ironically, Booksellers' overstated argument clarifies the Fourth Circuit's erroneous use of the facial overbreath doctrine. Appellees hypothesized below, as they do here, a worst case scenario of the Amendment's scope, but this Court has "never found that a statute could be facially invalid merely because it is possible to conceive of a single impermissible application. . . ." *New York* v. *Ferber*, 458 U.S. 747, 772 (1982). Any concern the Fourth Circuit had about the Amendment's potential overbreath should have been resolved through an *applied* overbreath analysis when and if the situation ever actually arose, allowing arguably impermissible applications to be "cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broaderick* v. *Oklahoma*, 413 U.S. 601, 615-16 (1973).

Due to Booksellers' preemptive attack on the Amendment, no Virginia court has ever had the opportunity even to construe its language, much less narrow it. Virginia suggested several ways the Amendment could be narrowed if necessary. So long as a limiting construction may be placed on a challenged provision, it is not facially overbroad. *Broaderick*, 413 U.S. at 613.[2]

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[1] Virginia did *not* concede below that just having Jackie Collins' *Hollywood Wives* on a store's premises would be a misdemeanor: Virginia simply stated that of Booksellers' sixteen exhibits, *Hollywood Wives* was the only one that might possibly even be considered "harmful to juveniles" under the statute. (Virginia's Fourth Cir. Br. at 25). And Virginia expressly disputed Booksellers' assertion that just having a proscribed book in a store violated the Amendment. (Virginia's Fourth Cir. Br. at 6).

[2] A Virginia court can narrow a statute's language without "rewriting" it. *See e.g. Price* v. *Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974) (Supreme Court of Virginia narrowed definition of obscenity by judicial construction).

Booksellers further appear to contend that the court of appeals' invalidation of Virginia's Amendment will have little, if any, effect on other States' display provisions. Not only do Virginia's twenty-two *amici* obviously disagree with this view, Georgia's display statute has already been held unconstitutional, due in no small part to this case. *American Booksellers Ass'n, Inc.* v. *Webb*, 643 F.Supp. 1546, 1554 (N.D. Ga. 1986). Indeed, unless the Fourth Circuit's decision is reversed by this Court, it will undoubtedly be the centerpiece in a wave of piecemeal attacks on every display provision in this country.

Finally, Virginia has consistently asserted that the Amendment is a valid time, place and manner regulation. *See Renton* v. *Playtime Theatres*, 475 U.S. ___, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Upper Midwest Booksellers; M.S. News Co.* Booksellers do not dispute this contention.

CONCLUSION

Although the Appellees attempt to minimize the importance of this issue, their arguments actually highlight the substantial federal question involved and the defects in the court of appeals' decision. The Fourth Circuit's opinion conflicts with decisions of this Court, as well as with those of the Eighth and Tenth Circuits; it has a potential impact on at least twenty-eight states and numerous localities; and, it severely restricts, if not destroys, Virginia's ability to enforce the concept of variable obscenity validated by this Court in *Ginsburg*. This substantial federal question is not just worthy of this Court's full consideration. The Fourth Circuit's judgment should be summarily reversed.

Respectfully submitted,

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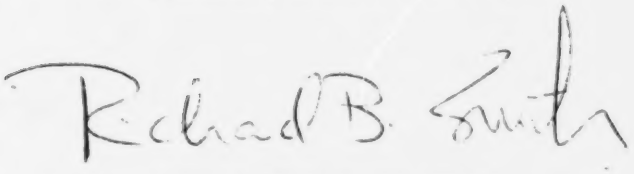

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February 6, 1987

Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1034

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v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE INSTITUTE FOR YOUTH ADVOCACY, *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

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Question Presented

Is it unconstitutional for a State to discourage the in-depth exposure of juveniles to sexually graphic, harmful materials by imposing time, place and manner regulations on their commercial, public display?

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BRIEF *AMICUS CURIAE*

The Institute for Youth Advocacy, Covenant House, respectfully submits this brief *amicus curiae* in support of the Commonwealth of Virginia in this case. The consents of Appellant and Appellees have been obtained and have been submitted to the Clerk on this date.

Statement of Interest

The Institute for Youth Advocacy is a part of Covenant House, the largest organization in the country serving homeless and runaway children. Since 1972 Covenant House has provided crisis shelter, health care, counselling, educational/vocational assistance, and legal services to over 60,000 children, mostly adolescents aged 12 to 20. Founded by Fr. Bruce Ritter, a Franciscan priest, Cov-

enant House takes as its mission reaching out to vulnerable teenagers and young children who find themselves cut off —sometimes temporarily but often permanently—from their families and exposed to the most dangerous currents of streetlife in urban America, from crime to drugs to prostitution. Internationally recognized for his work—which is supported almost entirely by private contributions —Fr. Ritter was named an American "hero" by President Ronald Reagan in his 1984 State of the Union Address, and served as a member of the Attorney General's Commission on Pornography.

In 1981 this Court granted leave for Covenant House to appear *amicus curiae* representing sexually exploited children in the landmark child pornography case *New York* v. *Ferber*, 458 U.S. 747 (1982). As a result of that effort, and because of demands that Covenant House represent publicly the needs of vulnerable children and youth, the Institute for Youth Advocacy was founded in 1982. The Institute currently serves as a center for research and advocacy on issues closely related to the needs of teenagers on the streets, and others at risk of homelessness or exploitation. In significant part through its efforts Congress enacted the Child Protection Act of 1984, and the Child Abuse Victims Rights Act of 1986—both designed to provide federal help against sexual exploitation of children, and to strengthen federal child pornography laws. The Institute has frequently been asked to testify before Congressional committees on questions concerning the welfare of children.

As part of Covenant House, the Institute seeks to participate in this case because of the importance of shielding children and teenagers from premature exposure to commercial hard-core pornography. It is the experience of Covenant House that such material glamorizes prostitu-

tion and validates sexual exploitation—thus making young people all the more vulnerable to such exploitation at home and on the street. None of the parties in the case have observed, as have all who work with children at Covenant House, the ravages inflicted by America's enormous sex industry on millions of children who furtively consume its products—and on the thousands who, through child pornography and prostitution, are consumed by it. Nor are the parties likely to be as fully aware as Covenant House of the agony suffered by parents who sincerely hoped to spare their children the premature sight of graphic sexual activity, whether in a Times Square doorway, an "adult" moviehouse, or the neighborhood bookstore—all to no avail. For these reasons the Institute for Youth Advocacy of Covenant House respectfully submits this brief *amicus curiae* in support of the Commonwealth of Virginia.

Statement of the Case

Amicus accepts and adopts the Statement of the Case provided by Appellant in its Jurisdictional Statement 3-5, with the following additions.

Prior to 1985 the laws of the State of Virginia prohibited sale or loan to a juvenile of any sexually explicit material (1) that depicts human nudity, sexual conduct, or sado-masochistic abuse and (2) that is "harmful to juveniles." Va. Code §18.2-391(a). In 1985 Virginia amended its law to prohibit as well the knowing "display for commercial purpose" of such material "in a manner whereby juveniles may examine and peruse" it. *Id.* Less than one month after enactment of that amendment Appellees commenced this lawsuit, and on September 16, 1985, the U.S. District Court for the Eastern District of Virginia issued a judgment finding the "display" amendment unconstitutional and

enjoining its enforcement. *American Booksellers Ass'n, Inc.* v. *Strobel*, 617 F. Supp. 699 (E.D. Va. 1985). The State of Virginia appealed to the Fourth Circuit Court of Appeals.

On September 30, 1986, the Court of Appeals issued its final opinion affirming the decision of the District Court with respect to issuance of injunctive relief against enforcement of the "display" amendment. *American Booksellers Ass'n, Inc.* v. *Virginia*, 802 F.2d 691 (4th Cir. 1986). (An order of the District Court denying attorney's fees to Appellees, however, was reversed. *Id.*) In the course of its opinion the Court of Appeals acknowledged:

> Because of its recent passage, no one has been prosecuted under the Virginia amendment. Additionally, there was *little specific evidence* presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions.

802 F.2d at 696 (footnote omitted) (emphasis added). In a footnote, the Court of Appeals noted that the "district court heard testimony from three witnesses in order to 'flesh out' the pleadings and provide a more complete record." *Id.* Neither the District Court nor the Court of Appeals discussed in their opinions the force of Virginia's claim that the challenged statute is necessary to protect its children from harm. *See especially, American Booksellers Ass'n, Inc.* v. *Strobel*, 617 F. Supp. at 702-703. Nor was any specific evidence cited that sales of any materials to adults will decline if the statute is enforced. 617 F. Supp. at 703-704.

Summary of Argument

The uncontrolled exposure of children to sexually graphic materials—those defined as "harmful" to minors under the challenged statute—has been recognized as dangerous by social scientists, by four government commissions in the United States, Canada and Great Britain, by hundreds of state legislators, and by this Court in *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Virginia's prohibition of the commercial display of such materials in a manner permitting minors to "peruse" them—that is, to examine them closely—is a carefully limited attempt to keep this exposure under the control of responsible adults. The State's interest—protecting children—is of an extremely high order.

The First Amendment interests affected, by contrast, are slight. Juveniles, under *Ginsberg*, have no constitutional right to examine the materials carefully defined by the challenged statute. Adult customers of the businesses affected may have to walk over to an "adults only" section of the store, or ask a sales clerk for access to a particular item—but these inconveniences are trivial compared with zoning restrictions on "adult" businesses already approved by this Court. Indeed, no credible evidence has been offered that such restrictions actually inconvenience anyone: appellees make no showing that sales of "adult" materials have declined in states with "display laws." The segregation of "adult" material might in fact make it much *easier* for adult customers to find it.

Even if the speech interests of adults in this case were substantial, they would be insufficient to invalidate what is ultimately a straightforward, fully constitutional regulation of commercial speech. The commercial display of books, magazines and films to minors is an archetype of

"commercial speech" as defined by this Court. Because sale of statutorily defined "harmful" materials to minors is illegal, the commercial display of such materials to minors may also be outlawed. Even if such sale were legal, the challenged statute would easily pass the three-part test of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557 (1980). Given the strength of Virginia's interest in protecting its young, this is a strikingly inappropriate occasion for judicial invalidation of a statute based on facial "overbreadth."

Introduction

> *Yet were I grossly destitute of all*
> *Those human sentiments that make this earth*
> *So dear, if I should fail with grateful voice*
> *To speak of you, ye mountains, and ye lakes*
> *And sounding cataracts, ye mists and winds*
> *That dwell among the hills where I was born,*
> *If in my youth I have been pure in heart,*
> *If, mingling with the world, I am content*
> *With my own modest pleasures, and have lived*
> *With God and Nature communing, removed*
> *From little enmities and low desires,*
> *The gift is yours; . . .*[1]

It is a central insight of Wordsworth's *Prelude* that the images we behold in childhood by chance, along with the words we are carefully taught, ultimately shape our character. Beautiful or ugly, sublime or squalid, those images will form the basis of our response to an adulthood "'mid indifference and apathy" and the "melancholy waste of hopes o'erthrown."[2]

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[1] W. Wordsworth, *The Prelude*, Book Second 421-432 (1798-1805).

[2] *Id.*, at 434-35.

That insight has been central, as well, to American constitutional law since *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where the Court recognized the power of an image confronting children—in that case, the American flag—as a "short cut from mind to mind." 319 U.S. at 632. Twenty-five years later, in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), a decision crucial to this case, the Court specifically recognized the power of sexually explicit images over children—finding that "exposure" to such images could constitute an "abuse" against which a state might reasonably act to protect its children. 390 U.S. at 640-43.

This case differs from *Ginsberg* in only one detail: the prohibited "exposure" of graphic sexual material to children takes the form of encouraging them, in a commercial setting, to "examine and peruse" the material—that is, according to the dictionary definition of "peruse," to "examine [it] with attention and in detail" [3]—rather than, as in *Ginsberg*, to purchase it. Va. Code §18.2-391(a). *Ginsberg*, of course, examined the fundamental issue of whether "freedom of expression constitutionally secured to *minors*," 390 U.S. at 637 (emphasis added), was impaired by such a regulation. Here, by contrast, the only interest asserted is that of adults to be free of the "unavoidable collateral effect" imposed by "display laws"—that of restricting their ability to see a public display of materials that are properly forbidden as to children but constitutionally protected as to adults. *American Booksellers* v. *Strobel*, 617 F. Supp. 699, 706 (E.D. Va. 1985), *aff'd sub. nom. American Booksellers* v. *Virginia*, 802 F.2d 691 (4th Cir. 1986). The lower courts in this case—rejecting

[3] Webster's New Collegiate Dictionary 849 (1980). The statute's use of "peruse" seems carefully calculated to prevent its application to incidental or extremely brief displays of harmful material.

the views of two other circuits[4]—somehow managed to find this "collateral effect" to be of crucial constitutional magnitude.

A more careful consideration of the competing values at stake suggests a rather different conclusion. Empirical evidence, supported by every major public study of the issue, strongly indicates that protection of minors from viewing graphic sexual material—outside an educational or carefully controlled setting—is a governmental responsibility of a high order. By contrast, the interest of adult customers—much less of appellee booksellers—in open, wholly unregulated display of such materials is almost ludicrously slight. Finally, the *display* for sale of books and magazines, is *commercial* speech subject to far more substantial legitimate state regulation than would be, for example, actual *sale* of the material. In view of the risks to children involved, Virginia's display law is a permissible, indeed a laudable exercise of that State's regulatory power on behalf of children.

I.

Virginia Has a Strong Interest in Protecting Children From Uncontrolled Access to Graphic Sexual Material.

When this Court first addressed the problem of minors' access to sexually explicit material in *Ginsberg*, it recognized the impossibility of applying "scientifically certain criteria," 390 U.S. at 643, in an area where certainty is a scientific impossibility. Likewise it was the "consensus" conclusion of a recent panel of social scientists reporting to the Surgeon General that "it is really rather difficult

[4] *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

to say much definitive about the effects of pornography on children. The direct research is not present, and probably never will be." [5] The very reason for the absence of research is, nevertheless, a telling one for this case: the clear consensus among scientists that "showing pornography to children is a morally distasteful and at present an ethically unsupportable manipulation," particularly because "the potential negative outcomes are too diffuse, and the theory too sparse to protect the children taking part. . . ." [6]

That these ethical fears are not chimeras, but real dangers threatening children, is a fact supported by the substantial weight of the evidence—most of it indirect—that does exist. Thus a wide array of studies of older adolescents attending college have shown significant correlations between exposure to sexually explicit magazines and beliefs that women enjoy forced sex[7] as well as actual past rape

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[5] E. Mulvey & J. Haugaard, *Report on the Surgeon General's Workshop on Pornography and Public Health* 38 (1986) (hereinafter "Surgeon General's Report").

[6] *Id.* at 6. *See* 2 *Pornography and Prostitution: Report of the Special Comm. on Pornography and Prostitution to the Minister of Justice and Attorney General of Canada* 570-71 (1984) (hereinafter the "Canadian Report").

[7] *See* N. Malamuth, *Do Sexually Violent Media Indirectly Contribute to Antisocial Behavior?* in *Surgeon General's Report*, *supra* note 5, at 10 (discussing extant studies); D. Zillman & J. Bryant, *Effects of Massive Exposure to Pornography*, in *Pornography and Sexual Aggression* 115, 133-134 (N. Malamuth & E. Donnerstein ed. 1984). One particularly dramatic study—completed in Canada—showed that college students had far more dramatic reactions to viewing pornography, including a significant increase in their "reported likelihood of rape," than did older subjects. J. Check, Psychoticism and Habitual Pornography Consumption as Mediators of the Effects of Exposure to Violent and Nonviolent Pornography, Paper Presented at Meeting of Int'l Soc. for the Study of Individual Differences, Sant Feliu de Guixols, Spain 54-56 (June 1985).

behavior.[8] Not surprisingly, the most recent evidence suggests that, as compared with nonoffenders, serious sex offenders of all varieties have had substantially greater exposure to nonviolent pornography at pubescence.[9]

On a less extreme, but perhaps more alarming level, the Surgeon General's panel recently reached consensus that, in laboratory experiments, repeated exposure to "pornography" alters "the beliefs of late adolescents about the frequency of certain uncommon sexual practices in the general population."[10] The work of Professor Dolf Zillman goes further, showing that repeated exposure of college students to sexually explicit materials produced attitudinal changes that included significantly higher rates of acceptance of: (1) pre- and extramarital sex; (2) nonexclusive sexual intimacy; (3) deviant sexual practices; (4) women's "sexual servitude"; and (5) the relative triviality of rape.[11] More directly still, a recent scientific sur-

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[8] M. Koss & T. Dinero, Predictors of Sexual Aggression Among a National Sample of Male College Students, Presented at N.Y. Acad. of Sciences Conf., New York City 16 (Jan. 7, 1987) (study of 2972 male college students). For a full discussion of similar studies, see Attorney General's Commission on Pornography, 1 *Final Report* 939-952 (1986) (hereinafter "Attorney General's Report").

[9] W. Marshall, *The Use of Pornography by Sex Offenders*, in *Transcript of Proceedings, U.S. Dep't of Justice, Attorney General's Comm'n on Pornography, Public Hrg., Houston, Tex.* 117A, 117S-117T (Sept. 12, 1985). *See also*, 1 *Attorney General's Report*, *supra* note 8, at 957-963 (discussing studies on early exposure to pornography among sex offenders).

[10] Surgeon General's Report, *supra* note 5, at 56.

[11] *Effects of Repeated Exposure to Nonviolent Pornography*, in *Transcript of Proceedings, U.S. Dep't of Justice, Attorney General's Comm'n on Pornography, Public Hrg., Houston Tex.* 128A, 128C-128G (Sept. 11, 1985) (hereinafter "Houston Pornography Hearing"). *See*, 1 *Attorney General's Report*, *supra* note 8, at 994-1003 (discussing this and other studies of "longer-term exposure").

vey of 400 boys and girls aged 13 to 18 found: (1) two-thirds of the boys exposed to "X-rated" material wanted "to try some of the behaviors depicted in hardcore erotica"; and (2) 25 percent of the boys exposed (as well as 15 percent of the girls) "reported imitating the sexual behaviors they had seen in the X-rated materials." [12]

The effects of such imitation can hardly be called socially harmless. Thus a recent state-by-state study of adolescent pregnancy rates found a highly significant correlation between the level of sales of sexually explicit magazines in each state and the teenage pregnancy rate.[13] "Where they [sales of such magazines] are high," the study concluded, "rates of [teenage] pregnancy, birth and abortion are high." [14] Such correlation evidence "proves" nothing in a "scientific" sense, but in the absence of countervailing evidence of similar quality, and with regard to a population which cannot be studied directly, Virginia's legislators would be fully justified in drawing inferences supportive of the challenged law.

It is clear, finally, that teenagers are currently exposed in enormous numbers to "X-rated" materials. Thus half or more males have been exposed to sexually explicit material by age seventeen, and indeed minors may be the *most* frequent consumers of such material.[15] The survey

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[12] J. Bryant, *Effects of Massive Exposure to Pornography on Everyday Moral Judgment*, in Houston Pornography Hearing, *supra note* 11, at 157A, 157G.

[13] S. Singh, *Adolescent Pregnancy in the United States: An Interstate Analysis*, 18 Family Planning Perspectives 210, 214 (1986).

[14] *Id.* The quoted statement also refers to similar high correlations between pregnancy rates and such other social factors as crime rate, teenage suicide rate, population growth, and mobility.

[15] *See* 1 *Attorney General's Report*, *supra* note 8, at 914-921, and studies discussed therein. *See also*, 2 *Sexual Offenses Against*

(footnote continued on following page)

of teenagers discussed above revealed startling levels of exposure to pornography among the young: 91 percent of boys and 82 percent of girls had "seen a magazine which depicted couples or groups in explicitly sexual acts"; the average age of first such exposure was thirteen and a half.[16] Among girls their first exposure occurred 50 percent more often by having "stumbled on the material by accident" than from having taken any initiative in seeking it out.[17]

The Commonwealth of Virginia can hardly be faulted, then, for believing that exposure of its youngest citizens to sexually explicit material poses serious risks to their welfare and maturation; further, strong evidence exists that such exposure is far from a rare event. These conclusions of this legislature are different in no essential from those of every major government commission to have studied the issue of pornography in the United States, Canada, and Great Britain;[18] as well as those of hundreds of other legislators.[19] Thus even the 1970 Presidential

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(footnote continued from previous page)

Children: Report of the Comm. on Sexual Offenses Against Children and Youth to the Minister of Justice and Attorney General of Canada 1261, (1984) (41 percent of Canadian males, 21.6 percent of females had purchased explicit pornography before age 18); *id.* at 1274-75 (6 percent of Canadians had been exposed to pornography against their will, most before age 18) (hereinafter "Canadian Sexual Abuse Report").

[16] Bryant, *supra* note 12, at 157E.

[17] *Id.*

[18] *See The Report of the Commission on Obscenity and Pornography* 62-68 (C. Barnes ed. 1970); *Report of the Committee on Obscenity and Film Censorship* 125-126 (B. Williams Chmn. 1979) (Great Britain); 2 *Canadian Report*, *supra* note 6, at 692; *Canadian Sexual Abuse Report*, *supra* note 13, at 106; 1 *Attorney General's Report* at 390-391.

[19] *See* Brief of States of Georgia, *et al.*, *amicus curiae*, Appendix 1 (supporting Appellant's Jurisdictional Statement).

Commission on Obscenity and Pornography—which recommended complete abolition of all other restrictions on the circulation of sexually explicit material—urged the prohibition of "commercial distribution or *display*" of most pornography to minors.[20]

Against this backdrop of consensus among scientists and scholars, it seems all too clear that the lower courts in this case have underestimated the interests of children that are at stake—and their "peculiar vulnerability" to harm. *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) (opinion of Powell, J.). And it is apparent, too, that they have forgotten "the importance of the parental role in child rearing," *id.*—a role that in the area of sexuality may be emasculated when children can freely peruse graphic materials that their parents would never wish them to see.

II.

Any First Amendment Interests Affected by the Challenged Statute Are Insubstantial—and Affected Only to an Extent Necessary for Protection of Children.

In the twenty years since *Ginsberg* v. *New York* evidence to suggest deep concern about exposure of the young to sexually graphic material has, if anything, grown. Yet here the Appellees insist that a different concern should take precedence—the "right" of "adults and older juveniles" to have "access" to constitutionally protected materials. (Appellees' Motion to Affirm or Dismiss at 5.) In view of *Ginsberg* and subsequent decisions of this Court

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[20] Report of the Commission on Obscenity and Pornography, *supra* note 18, at 62 (emphasis added). *See* 2 *Canadian Report*, *supra* note 6, at 692 (urging prohibition of display "in such a manner that [visual pornographic material] is accessible to, or can be seen or examined by anyone under 18 years of age").

concerning sexually explicit materials—and in view of the record of this case—that concern is at best trivial, and at worst facetious.

First, of course, the purported rights of minors to have access to such materials was *precisely* the issue decided in *Ginsberg*. 390 U.S. at 637. Like the statute here, the New York law upheld in *Ginsberg* made no distinction between younger and older juveniles—and, to be sure, Appellees cite no evidence suggesting that 17-year-olds are any less vulnerable to the effects of pornography than young children. (They may well be, after pubescence, *more* vulnerable.)[21] Moreover, it is impossible to imagine how a teenager's constitutional rights are *not* impaired by prohibiting a store owner from *selling* harmful material to her, and at the same time *are* impaired by telling the store owner not to let her "peruse" it. If that is Appellees' argument, they might as well call honestly for the Court to overrule *Ginsberg*—for at least with regard to the constitutional rights of *juveniles*, there can be no principled distinction between the cases.

With respect to adults, of course, this case *is* different from *Ginsberg*: here the restrictions on commercial display cannot be crafted so that adults are utterly unaffected. Neither of the courts below nor any of the parties have suggested any practical way of preventing minors from carefully examining harmful material in a commercial establishment without somehow affecting the access of adults

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[21] Before pubescence, of course, children may not even realize what they are seeing when confronted by pornography. It is during adolescence that one major study found pornography to be most traumatic in its impact: thus over half of those who were exposed to pornography "against their wills" and over half of those who reported having been "shown pornography . . . and sexually assaulted by the same person" were aged 14 to 20 at the time of the incident. *Canadian Sexual Abuse Report*, *supra* note 15, at 1274-1279. *See also*, Cheek, *supra* note 7, at 54-56 (college students far more strongly affected by pornography than adults).

to it. Thus the issue here cannot be whether a "more selective approach," *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 74 (1981), is possible. Virginia has chosen the *only* approach realistically suited to prevent commercial display of harmful material to minors, and the corresponding effects on adults are inevitable.

Inevitable—but not in the least degree significant. To be sure, the Court of Appeals suggested that forcing bookstores to place harmful materials in an "adults only section," in sealed wrappers, or "under the counter" is a "real and substantial" infringement on "first amendment rights." 802 F.2d at 696. Yet such restrictions differ from those previously allowed in *Renton* v. *Playtime Theatres, Inc.*, —— U.S. ——, 89 L.Ed.2d 29 (1986), and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), only in being far *less* real, far *less* substantial. Here, as in *Renton* and *Young*, the State is acting against the "secondary effects" of the sale of "adult" materials, not by attempting to reduce the overall volume of such sales, but by imposing a regulation on the manner in which they occur. *See Renton*, 89 L.Ed.2d at 37. In three crucial respects, moreover, the law challenged here is *more* congenial to First Amendment values than those upheld in *Young* and *Renton*.

First, in contrast with *Renton*, the circumstances do *not* "suggest that the [law] was designed to suppress expression." 89 L.Ed.2d at 47 (Brennan, J., dissenting). Neither Appellees nor the courts below have offered any explanation for passage of the challenged statute except that offered by Virginia: desire to protect children from being harmed as a secondary effect of certain types of marketing of "adult" materials. In this case it cannot be plausibly asserted, as it could be in *Renton* and *Young*, that a desire to reduce lawful circulation of "adult" materials had *any*

role, even a subsidiary one, in passage of the law. Virginia may well have hoped the law would reduce circulation of such materials among minors: e.g., by limiting their awareness of the existence and nature of the materials, and limiting their ability to try to fool store clerks into selling them. But that motivation is precisely what *Ginsberg* approved, and no other one has ever been mentioned below.

Second, the strength of the evidence for harmful "secondary effects" from Appellees' business practices is far stronger here than the corresponding evidence in *Renton* and *Young*. In this case there are no vague (if still fully legitimate) concerns for the "quality of urban life" based on studies of disputed validity, *Renton*, 89 L.Ed.2d at 46-47 (Brennan, J., dissenting). Rather it is the consensus of scientists and reputable policymakers that uncontrolled exposure of children to sexually graphic materials is seriously dangerous. Not even Appellees have attempted to suggest otherwise. Thus the "secondary effects" feared here are, if anything, far graver and far more grounded in hard reality.

Finally, the restrictions imposed by the challenged statute are much less burdensome than those permitted in *Young* and *Renton*. There the bookseller was forced to move his whole store; here he is required to move a few books. Creation of a special "adult" section within a store seems a laughably small burden to impose, particularly when many video outlets, magazine stands, and bookstores already set aside separate space for such materials—not to mention the self-imposed rating system of the motion picture industry. In *Renton* it was possible to be concerned that the challenged ordinance would wholly eliminate "adult" theatres from the city, 89 L.Ed.2d at 48-49 (Brennan, J., dissenting); by comparison the restrictions challenged here are exceedingly slight.

But even if *Young* and *Renton* were wrongly decided—as Appellees apparently believe *Ginsberg* was—where is the evidence for any substantial interference with speech rights in this case? The Court of Appeals itself conceded that "little specific evidence" was presented on behalf of Appellees' claim. 802 F.2d at 696. Most tellingly, Appellees have presented no evidence showing a decline in sales of "adult" materials after passage of "display laws" in other states. Instead, they present speculations: *e.g.*, that adults will not walk over to a special "adult" section of a bookstore, or will be reluctant to ask store clerks for help. *Id.* Have they presented one credible piece of evidence showing that to be the case? Don't adults currently seek out sections marked Children, Health, Romance, Sex and Marriage in thousands of bookstores everyday? Don't adults ask store clerks for help constantly in finding items not clearly on display? Virginia's law may, if anything, make it *easier* for customers to find the sexually explicit materials they came into the store to examine or buy.

On this record the evidence is ludicrously slight that the challenged statute will affect the actual access of adults to sexually explicit material. By contrast, the evidence for harm to children from their uncontrolled consumption of such material is as strong as the limits of scientific research—and of public policy analysis—will permit. Surely a facial challenge for overbreadth demands more—especially where children are at risk. *See New York* v. *Ferber*, 458 U.S. 747, 769-774 (1982).

III.

Virginia's Statute Is a Reasonable Limitation on Commercial Speech.

By failing to take account of the State's important interest in protecting children from exposure to sexually explicit materials, and by grossly overestimating the effects of Virginia's law on adults, the courts below reach an indefensible result—even within the analytic framework they employed. That framework itself, however, was their most egregious error—an error so fundamental that it may justify summary action by this Court. For in regulating the commercial display of pornography Virginia is regulating pure *commercial speech* as it has been defined by the decisions of this Court. And viewing the case from that standpoint it would be impossible to justify invalidation of the statute even if the "speech" interests of adults were more than trivial.

This Court has long recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation and other varieties of speech." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 562 (1980), *quoting Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978) (citations omitted). The commercial display in a window or on a shelf of appliances, food, clothing, jewelry—and of books, magazines, and films—is squarely within the area of "commercial speech" marked out by the distinction. Appellees are not librarians, eager for the public to come in and *browse*. They display materials solely for purpose of proposing their *sale*. What they stock and how they show it off has nothing to do with ideology or even a desire to entertain—it has to do, rather, with a desire for profit.

The challenged statute, by limiting its application to commercial display, is thus purely, and merely, a regulation of commercial speech.

As commercial speech, the display of harmful material to minors is quite clearly subject to state control. For the sale of such material to minors is unlawful, and the "government may ban . . . commercial speech related to illegal activity, *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376 (1973)." *Central Hudson Gas, supra*, 447 U.S. at 563-564. Thus this case is actually much more straightforward than that which closely divided the Court last Term, *Posadas de Puerto Rico Ass'n* v. *Tourism Co. of Puerto Rico*, —— U.S. ——, 92 L.Ed.2d 266 (1986). In *Posadas* advertising was regulated with regard to an activity which could *theoretically* be declared unlawful, 92 L.Ed.2d at 238; here, Virginia only forbids the proposal of a commercial transaction *already* outlawed. See *Pittsburgh Press*, 413 U.S. at 388.

Yet even were the display to minors of carefully defined "harmful" materials *not* illegal, the statute in question would easily survive the three prongs of *Central Hudson analysis*. 447 U.S. at 563-564. *See Posadas de Puerto Rico*, 92 L.Ed.2d at 280. Thus it is obvious—and uncontradicted by appellees—that the government's interest in protecting children from exposure to such materials is "substantial." *Central Hudson*, 447 U.S. at 564. Second, prohibiting the commercial display of harmful materials in a manner that children may peruse them does "directly advance" that interest. *Id.* Finally it is impossible to imagine how "the governmental interest could be served as well by a more limited restriction," *id.*—and certainly neither the courts below nor Appellees have suggested how. In view of the strength of the State's interest here, the challenged remedy plainly meets the fundamental *Cen-*

tral Hudson requirement that "the regulatory technique must be in proportion to [the State's] interest." *Id.*

Because the issue in this case is *commercial* speech, the concerns of the courts below for supposed speech interests of adults are seriously misplaced. As this Court recognized in *Central Hudson*, "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is 'not particularly susceptible to being crushed by overbroad regulation.' *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977)." 447 U.S. at 564 n. 6. Appellees doubtless will find other ways besides uncontrolled display to sell their sexually explicit books. They can, under the law, loudly hawk the materials in person or over speakers in the store. They can paint red arrows pointing to the "adults only" corner. They can even advertise the materials over radio and television, and in all the newspapers. All they *cannot* do is cynically lure young potential customers onto the premises with the promise that they may examine harmful materials—hoping, perhaps, that they will buy something else once in the store—or cause young customers to come on such materials unawares.

CONCLUSION

This is a case not about speech, but about business, the business of exhibiting harmful, sexually graphic material to children. The statute challenged here threatens no adult with loss of access to words, ideas, photographs, or entertainment. Rather it represents a praiseworthy effort by the Commonwealth of Virginia, using the narrowest means available, to help parents protect their children's minds and hearts—to shield them "from little enmities and low desires." [22] The First Amendment does not forbid this gift.

The judgment of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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[22] *The Prelude*, *supra* note 1, at 431.

Certificate of Service

I hereby certify that on the 20th day of April, 1987, three copies of the annexed *amicus curiae* brief were mailed, postage prepaid, to:

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No. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Supreme Court, U.S.
FILED
APR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

THE COMMONWEALTH OF VIRGINIA

Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC.

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF OF THE NATIONAL LEGAL FOUNDATION AMICUS CURIAE, IN SUPPORT OF APPELLANT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. 86-1034

THE COMMONWEALTH OF VIRGINIA

Appellants

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC.

Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April, 1987, three copies of the Brief of Amicus Curiae, and a copy of the Statement Concerning First Class Mailing, were sent by first class mail with postage prepaid to each of the following pursuant to S. Ct. Rule 28.5(b):

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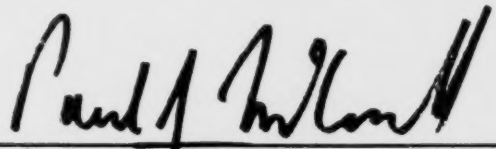

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STATEMENT CONCERNING FIRST CLASS MAILING
(Pursuant to Rules 28.2 and 28.5)

I hereby affirm that the enclosed Brief of Amicus Curiae was deposited in a United States Post Office or mailbox, with first class postage prepaid and properly addressed to the Clerk of this Court, on April 20, 1987, which was within the time allowed for filing; and that I am a member of the Bar of this Court.

Subscribed this 20th day of April, 1987.

The National Legal Foundation

By: _____
Paul S. McConnell

Subscribed and Sworn before me this 20th day of April, 1987.

_____
Notary Public

My Commission Expires: 4/23/89

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INTEREST OF AMICUS CURIAE

The National Legal Foundation was constituted for the purpose of advocacy in support of a proper rendering of the First Amendment. While typically this involves The National Legal Foundation on the side of individual plaintiffs, in this instance, it argues in support of legitimate, indeed compelling State interests and against a trivializing by defendants of the concept of freedom of speech. Futhermore, the Court's disposition of this case will dramatically affect the ability of States to protect the wellbeing of their youth.

The National Legal Foundation is a non-profit corporation organized to defend, restore and preserve constitutional liberties, family rights and other inalienable freedoms.

Counsel of record for Amicus Curiae, Robert K. Skolrood is Executive Director and Paul S. McConnell is Staff Attorney for The National Legal Foundation. Counsel for Amicus Curiae specialize in constitutional litigation and have participated in significant cases relating to First Amendment and other constitutional freedoms.

The National Legal Foundation believes the experience of its attorneys will be of assistance to the court in evaluating this case. Written consent of the parties has been obtained from Counsel of Record.

ISSUE PRESENTED

Whether Virginia Code Section 18.2-391 transgresses U.S. Constitutional restrictions protecting plaintiff's freedom of speech?

SUMMARY OF ARGUMENT

The Commonwealth of Virginia has ably argued on the issues of case or controversy and standing in its brief. Amicus concurs with the Commonwealth that defendants have failed to carry their burden of providing a case or controversy exists. Amicus, however, recognizes the Court may regard a decision on the merits of the First Amendment to be in the best interest of all parties. This brief, then, is directed toward support of the Commonwealth's free speech position.

In upholding the Dictrict Court opinion, the Fourth Circuit Court of Appeals was forced to adopt an unreasonable statutory and constitutional construction. After dismissing the pertinent standing issues, that court determined that the respondent's rights to sell indecent literature, and adult purchasers' right to buy such material without embarrassment satisfied the very high constitutional standard necessary to overcome Virginia's undeniably compelling interest in protecting its youth. This approach required a maximizing of a speculative right, and a minimizing of a long recognized State interest. Such strained interpretation and application of First Amendment principles should be exposed and overruled by this court. Failure to do so will be a signal to booksellers nationwide that all restrictions on display and distribution of indecent material to minors are suspect and ripe for challenge. The effect of such a ruling would be the expansion of pornography's outreach combined with its deadly impact on youthful minds.

THE COMMONWEALTH OF VIRGINIA

Appellants

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC.

Appellees

ARGUMENT

I.

APPELLEES HAVE NO ABSOLUTE RIGHT TO SELL INDECENT LITERATURE WITHOUT RESTRICTIONS DESIGNED TO PROTECT MINORS

In order to reach its conclusion that §18.2-391 was facially invalid, the Fourth Circuit recognized a very potent First Amendment interest on the part of the Booksellers. American Booksellers Association, Inc. v. Commonwealth of Virginia, 802 F.2d 691 (1986). That interest was so important that it overcame the straight-forward and compelling

interest of the State in protecting the well-being of its minor citizens (acknowledged by the Fourth Circuit at 694). What is the nature of the Bookseller's interest?

The Fourth Circuit did not assert the Booksellers possessed an independent, First Amendment right to communicate a particular message, rather, theirs was merely a "right to sell" the restricted materials. The Court should recognize that this is not an instance of censorship in which an author is prevented from publication of his books. No author or even publisher is here represented. The proofs the Booksellers adduced before the District Court concerned the economic impact they would suffer. The Fourth Circuit seems to accept the argument that this commercial interest is adequate to sustain the striking down of the Virginia provisions as overbroad.

In Young v. American Mini Theatres, 427 U.S. 50, Powell, J. concurring, acknowledged that the real First Amendment interest in a similar case belonged to the creator and to the potential consumers. The theater in that case, as the bookstore in this one, was nothing more "than a commercial purveyor," n.2, p.331. Said Powell at p. 77,

> Our cases reveal, however, that the central concern of The First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey.

In order to assess the impact of a statute on this right, Justice Powell adopted an analysis focusing on the impact on the creators and viewers of the material in question. The impact of the zoning laws which forced a relocation of two adult theatres he deemed "incidental and minimal" with respect to those two interests. While it was much less

"minimal" to the theatres themselves, they were not the communicators or readers.

> They do not profess to convey their own personal messages through the movies they show, so that the only communication involved is that contained in the movies themselves. Id., at p. 331 n.2.

Similarly, in Arcara v. Cloud Books, Inc., 478 U.S. ___, 92 L.Ed.2d 568 (1986) closure of a combined adult bookstore and brothel was upheld by this Court. Despite the extreme economic impact of the closure on the bookseller's asserted rights, the Court reasoned,

> The severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same material at another location. At p. 577.

In the instant case, the impact of the statute is far less severe than the impact felt by Cloud Books, Inc. Appellee Booksellers do not have to close or move, merely perform some minimal housekeeping in order to comply with the law.

Moreover, the Booksellers have no particular message. This is not a Christian Science reading room or a church bookstore, but commercial booksellers with commercial interests in conveying books to the public without regard to subject so long as it is legal and it sells. In addition, the statute's scienter requirement saves even the burden of specific review on the part of the Booksellers. Content knowledge preaches any compliance duty under a reasonable reading of the statute, the Fourth Circuit opinion not withstanding.

The Fourth Circuit apparently understood the weakness of resting its decision on the Booksellers' right to sell. That right to engage in commercial activity, emanating from the "liberty" interest protected by the 14th Amendment, if anywhere (See, Meyer v. Nebraska, 262 U.S. 390 (1923)), cannot sustain a facial

overbreadth attack. Overbreadth is uniquely a First Amendment, speech-related concept. As Justice Powell recognized in Young, the theater or bookstore is merely the best situated to assert the author's or public's First Amendment right. Hence, we must consider the strength of the public's right to access. This right alone, among those asserted, could have provided a basis for an overbreadth holding if access was truly restricted. Here, however, it was not.

The entirety of the Court of Appeals' holding rests on a few sentences which convolute the right to access into a right to avoid potential embarrassment. In the Court's words:

> Many adults, for a variety of reasons, would not enter a display area identified as "for adults only." Selling materials in sealed wrappers or from under the counter would unrealistically limit access by adults . . . . Id., at p. 696.

No one has urged the regulation denies

any adult access to the material. Rather the Court's concern focuses on the burden of inconvenience placed on the adults' right. As argued infra, this is not a case where distribution is denied to all in order to protect youths - where the public must bend to the weakest member in the community. Neither is it a case where the State seeks "to burn the house to roast the pig" by prohibiting distribution of material appropriate for adults but inappropriate for young people. Butler v. Michigan, 352 U.S. 380,383 (1957). Both Butler and Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) involved statutes which absolutely restricted First Amendment access. These cases, relied upon by the District Court's decision (American Booksellers Associates v. Strobel, 617 F.Supp. 699 (D.C., VA, 1985)) involved statutes which prohibited adult access to objectionable materials.

In FCC v. Pacifica Foundation, 438 U.S. 726 (1978) this Court upheld a time restriction on broadcast of "filthy words," a comedic routine deemed inappropriate for young ears. The Court noted adults had access to such speech through many other avenues, and even re-broadcast at a suitable hour for more exclusively adult listeners would not necessarily be restricted. So long as adult access is not cut off, and other means for obtaining the material are available, minimal statutory restraints designed to protect significant State interests should not be overturned.

Here the extent of the burden on the purchasers is one of potential embarrassment of unduly sensitive adults. As with common-law assault and battery standards, so in this area courts should not adapt constitutional standards to the emotionally queasy. Such a lowest

common denominator approach would make constitutionally impossible any restriction in support of the admittedly strong State interest in protecting youth. If states cannot restrict sellers in their display practices, they cannot protect their young citizens from this material. The task of conscientious booksellers in making sure young people do not browse inappropriate matter will be made much easier by display restrictions. Common sense and experience inform us that a 13-year old would be far happier to quietly peruse dirty books unnoticed in a corner of a store than to be forced to ask for them, feign older age, or risk being questioned. Restricting display is of the essence of discharging the State's responsibility. That this may make some edgy adults uneasy is no concern of the law or the Constitution.

II.

THE STATE HAS A COMPELLING INTEREST IN PROTECTING MINORS FROM EXPOSURE TO SEXUALLY EXPLICIT MATERIAL

The State's interest in protecting the welfare of minors is within the scope of its police power. This Court has recognized two interests that justify the State restricting access to materials harmful to minors.

First, parents, who have the primary responsibility to "care and nurture" their child, and prepare their child for future obligations, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), should be "entitled to the support of laws designed to aid in the discharge of that responsibility." Ginsberg v. New York 390 U.S. 629, 639. Hence, since the "parent's claim to authority . . . to direct the rearing of their children is basic in the structure

of our society," Id., the State has a compelling interest in upholding parental authority in order to preserve the fabric of society.

Second, the State has an independent interest in protecting the well-being of its youth. Ginsberg, at p. 640. This Court, in New York v. Ferber, 458 U.S. 747 (1982) declared that "the State's interest in safeguarding the physical and psychological well-being of a minor is 'compelling.'" Id., p. 756-57.

Virginia's display provision serves each of these compelling interests. Although the State interest is perforce "compelling," this Court has recognized mere rationality is sufficient to sustain such a law against a charge of constitutional infirmity. Stating the test in the negative, the Ginsberg Court at 641 ruled that in order to uphold State power to enact the statute, all that needs

to be said is that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." Ginsberg, at p. 641.

It is a matter of common sense, and subject to judicial notice, that minors are exposed to obscene materials through public displays. In a case brought under a New York display law, for example, a store, described as a toy store, carried a display of technicolor cards depicting nudity and sexual conduct. People v. Oshry, 502 N.Y.S. 2d 590, 590-92 (J.Ct. 1986). See also People v. Lou Bern Broadway, Inc., 325 N.Y.S. 2d 806, 808 (Crim.Ct. 1971) (discussing advertisement "clearly visible from the center of Broadway" and containing a large photograph of a nude female), rev'd, 345 N.Y.S. 2d 1012 (Ct.App. 1973).

There is also little doubt that the natural curiosity of minors leads them to

seek access to obscene materials. According to the Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography, which report was quoted with approval by the Court in Paris Adult Theatre v. Slayton, 413 U.S. 49 (1973): "[T]he heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men)." at 57 n.7, quoting, the Report of the Commission on Obscenity and Pornography 401 (1970).

Although there are ethical constraints on experiments testing the effect of obscene materials on minors, there is considerable support for the conclusion that exposure is in fact harmful. In Ginsberg, the Court cited opinions that exposure to explicit material could disturb the maturation of and otherwise harm children. 390 U.S. at

642 n.10. See also Paris Adult Theatre, 413 U.S. at 58 n.8 (citing opinions that obscene material may have a harmful effect on persons in general); Statement of D. Tilton-Durfee, Final Report, Attorney General's Commission on Pornography 185-86 (1986),

> [O]ne can surmise from the availability of information we have regarding developmental age vulnerabilities of children that those in the early adolescent age group might be the most susceptible and the least capable of managing social and psychological dilemma produced by exposure to pornography.

Some studies done in connection with the 1970 Presidential Commission on Obscenity and Pornography suggest that exposure to pornography at an early age is significantly correlated with early sexual activity and sexual deviance. K. Davis and G. Braucht, Exposure to pornography, character and sexual deviance: A retrospective survey, 7 Technical Report

of the Comm. on Obscenity and Pornography 206-13 (1971); M. Propper, Exposure to Sexually Oriented Materials Among Young Male Prisoners, 9 Technical Report of the Comm. on Obscenity and Pornography 313, 320, 330-31 (1971) (large percentage of a sample of 476 inmates were exposed to visual pornography at early age). There are also numerous reports of children using pornography to harm themselves and others. E.g., Testimony, Final Report, Attorney General's Commission on Pornography 777, 785 (1986) (juvenile boys emulated pornographic pictures in initiating sexual activity with juvenile girls); Id. at 797 (boy used article in Hustler as guide to sexual experiment resulting in his death).

It is well known that pornographic materials are used by adult pedophiles in seducing and conditioning children. According to one article, "In all [sex]

rings, adult pornographic books are used for instruction [of children]." A. Burgess, C. Harman, M. McCausland, P. Powers, Response Patterns in Children in Adolescents Exploited through Sex Rings and Pornography, 141 Am. J. Psychiatry 656,657 (1984).

Although the public display of material obscene for minors cannot conclusively be said to directly lead to involvement in a sex ring, such exposure could serve as a first step in that process. Such a concern is "not irrational," Ginsberg, at 641, and can serve as a basis for regulation of minors' access to explicit material.

In enacting display laws, several State legislatures have expressly relied upon the conclusion that minors are harmed by exposure to obscene materials. For example, the Idaho legislature has said,

> It is hereby declared to be the policy of the legislature to restrain the distribution, promotion or dissemination of obscene material, or of material harmful to minors, or the performance of obscene performances, or performances harmful to minors. It is found that such materials and performances are a contributing factor to crime, to juvenile crime, and also a basic factor in impairing the ethical and moral development of our youth.

Idaho Code §18-1513 (1979). See also Ga. Code Ann. §16-12-101, finding "exhibition" harmful to the general welfare and morals of minors.

The State's purpose in protecting its young people from harmful material is defeated if minors can still thumb through the regulated materials without restraint. This interest extends not only to those minors who intend, upon entering the bookstore, to examine the materials, but also in protecting those minors who have no initial desire to examine the materials, but follow the alluring

invitation of glossy magazine covers and enticing titles.

The legislature could also rationally conclude that the display provision serves the parents' interests in the upbringing of their children. Understandably, many parents do not want their children exposed to sexually explicit material, and this display provision serves to support these parents' interests.

In summary:

1. The only right disturbed by §18.2-391 is that of the easily embarrased "grown up."

2. The State's interest is manifestly "rational."

3. Parents' interests are supported by §18.2-391.

4. Lack of display protection will be harmful to minors.

The Amendment is a Valid Time, Place and Manner Regulation

Even if a significant First Amendment right of adults is involved here, the statutory Amendment is a reasonable manner restriction. Nothing in the provision restricts the time or place of access. Adults are not banned from access to the materials. The Amendment merely places minimal restraints on the manner in which the sexually explicit materials are displayed, and hence available to adult consumers.

A content neutral manner regulation is valid if "designed to serve a substantial governmental interest," and does not unreasonably limit alternative avenues of communication. Renton v. Playtime Theatres, 475 U.S. ___, 89 L.Ed2d 29, 39 (1986). Clark v. Community for Creative Non-Violence, 468 U.S. at 293 (1984).

Of course, some attention must be paid to content solely in order to isolate that for which protection is needed. This does not violate content-neutrality. The plurality in Young understood that prohibitions aimed at protecting juveniles from sexually explicit materials,

> must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area. Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. Young, 427 U.S. at 69-70.

Justice Powell, concurring, stated:

> [The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings . . . . Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line

> of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. Id., 82 n.6.

The display provision involves content only to the extent necessary to identify those materials "harmful to minors." Once identified, the statute does not attempt to control the message, but only the manner of display so as to avoid harming children. The object of the law is to protect minors, not restrict speech on the basis of content.

1. The Amendment serves a legitimate compelling State interest.

2. Content is only relevant to achieve that interest.

3. Alternative channels of communication are left open for adults.

III.

THE SUBSTANTIAL OVERBREADTH DOCTRINE IS NO IMPEDIMENT TO THIS STATUTE

In light of the strong compelling State interest in protecting youth from harmful material, and the availability of the materials to adults, §18.2-391 is not substantially overbroad. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

The rationale behind the development of the overbreadth doctrine is that overlybroad laws operate to chill constitutionally protected speech by intimidating those not "hardy enough to risk criminal prosecution" into refraining from exercising their rights. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J. dissenting). The booksellers' interest is not in conveying a particular message or viewpoint, but merely an economic interest in sales. The

only possible chilling effect is one the creators of the material or the adult viewers experience. The fact that the statute inconveniences the adults' access to the materials is of no consequence since the statute's sanction is aimed at the booksellers, not the adults. The statute sweeps within its language neither the creators nor viewers of the materials. Because adult access is not denied, and neither author nor purchaser is threatened with sanctions, §18.2-391 does not operate to chill protected speech. Facial invalidation is not justified unless "it is not readily subject to a narrowing construction . . . ." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

> Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. Broadrick, 413 U.S. at 613.

Furthermore,

> This Court has never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. Ferber, 458 U.S. at 772.

If a federal court chooses to interpret a State statute absent State judicial construction, the federal court must adopt a construction that brings the statute into conformance with the Constitution. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, (1935); Screws v. United States, 325 U.S. 91, 98 (1943). Justice Harlan stated,

> But if there were room for two constructions . . . the court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution . . . . Our duty, therefore, is to adopt that construction which . . . brings the statute into harmony with the provisions of the Constitution.

Grenada County Supervisors v. Brown, 112 U.S. 261, 269 (1884).

The Fourth Circuit's decision has adopted the opposite rule, straining to construe the statute as unconstitutionally overbroad. In discussing various methods of compliance with the statute that would render it constitutional, the Fourth Circuit struck down each suggested alternative as unreasonable. If that approach is upheld, Virginia must abandon any hope of regulating the display of materials harmful to minors. Yet, the Fourth Circuit inconsistently acknowledged that the State has an interest in "shielding minors from sexually explicit materials." 802 F.2d 683, 694. Following its absolutistic holding, no such "shielding" is possible.

In light of the State's compelling interest in protecting minors, the methods of compliance suggested by the State under the statute are reasonable, and this statute may be readily narrowed so as to

withstand an overbreadth challenge.

IV.

CONCLUSION

The Commonwealth of Virginia, by its amendment to §18.2-391 has achieved both protection of its youth and of the free speech rights of its adult population. Read fairly, it fits well within constitutional norms long recognized by this Court. The unreasonable interpretation urged by appellees and followed by the Fourth Circuit, on the other hand, assault the State's duty to protect its minor residents and demeans freedom of speech.

For these reasons, the opinion should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

—v.—

AMERICAN BOOKSELLERS ASSOCIATION, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, *AMICI CURIAE*

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Questions Presented

Virginia amended its juvenile obscenity statute in 1985 to criminalize the display of any book (in bookstores, airport shops, or wherever books are sold) where it "may" be examined and perused by any minor if the book is "harmful to juveniles." The amendment constrains booksellers, on pain of criminal sanctions, to restructure their physical premises, reallocate employee effort, or decline to stock and sell such books.

1. Do booksellers whose activities are thereby regulated by the display amendment and publishers whose sales are thereby impaired have standing to challenge the law's constitutionality?

2. Did the courts below properly invalidate the display amendment on its face?

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Interest of *Amici Curiae*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and laws of the United States. Together with its state affiliates, including the ACLU of Virginia, the ACLU has frequently appeared in this Court and many other courts, as a party itself, as counsel for litigants, and as *amicus curiae*.

For the reasons advanced by appellees and by *amicus* Freedom to Read Foundation, we agree that the 1985 amendment to Virginia's juvenile obscenity statutes plainly violates the First Amendment. By prophylactically penalizing the mere open shelving of books

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[1] Pursuant to Supreme Court rule 36.1 letters of consent to the filing of this brief have been separately lodged with this Court.

protected by the First Amendment (albeit "harmful" to certain minors) the amendment will inevitably and overbroadly prevent booksellers from freely displaying books to persons constitutionally privileged to read them, and effectively preclude access to books by thousands who would otherwise have perused and purchased them.

Of at least equal importance to the substantive danger the display amendment poses to First Amendment values, however, is the harm that would be imposed by acceptance of Virginia's argument that the federal courts below lacked judicial power to review the amendment and strike it down on its face to protect the rights in jeopardy. This argument is inconsistent with decades of Article III jurisprudence which have recognized the power of courts to grant relief in pre-enforcement challenges to statutes which

will predictably impair vital constitutional rights.

Statement of the Case

Prior to 1985, the State of Virginia maintained and actively enforced statutes prohibiting not only the sale to anyone of all materials defined as "obscene" but also the sale to certain minors of a broader range of materials that could be "harmful" to juveniles. These statutes exercised the state's full power to censor reading materials as defined by the Court in Ginsberg v. New York, 390 U.S. 629 (1968) and Miller v. California, 413 U.S. 15 (1973).

In 1985, despite the lack of any evidence suggesting that the prior law had been ineffective in accomplishing the state's interest in protecting its juveniles from material obscene as to them, the state enacted the display amendment at issue here,

expanding its regulation of printed materials by prohibiting the display of books, fully constitutionally protected for adults and mature minors, in a place where juveniles might examine or peruse them.

Booksellers and publishers whose books are sold in Virginia brought this pre-enforcement challenge shortly before the display amendment took effect. They demonstrated in the lower courts the relentless censorial havoc which the amendment would create to free access to constitutionally protected books. Because the books affected by the display amendment extend by definition well beyond the category of the legally obscene under Miller, the display amendment necessarily compels all booksellers to take one of the steps identified by the courts below: to stop selling the affected books, to ban minors from the store altogether, or to reconfigure the stores (or reallocate employee

effort) to preclude perusal of affected books by any minor. Moreover, stores will no longer be able to hire minor employees to unpack and shelve books.

The record and findings below clearly establish that the display amendment would result in diminished sales in bookstores and even in the removal of many books from the shelves of non-traditional bookstores. For example, only 10% of Bantam's books are sold in "the traditional bookstore environment." Over 90% are sold in retail outlets, such as airports, office lobbies, variety stores, drug stores, and supermarkets, and impulse sales of displayed books in such environments account for more than one-half the sales of any given paperback. J.A. 24. It is not feasible to ban children from such locations or to set up separate adults-only areas in them. The only way for these non-traditional booksellers to comply with the statute,

therefore, would be to stop carrying books protected by Miller but arguably not (as to some minors) by Ginsberg.

Summary of Argument

The Court has regularly sustained the Article III judicial power to entertain pre-enforcement challenges to criminal statutes or administrative regulations which will predictably affect a plaintiff's business operations or profits. Here, appellees amply demonstrated, and both the District Court and the Fourth Circuit found, that the display amendment would require substantial and costly changes in the operation of their business. Moreover, appellees' standing to challenge the display amendment is buttressed by their First Amendment right to freely display and grant access to constitutionally protected reading materials, and the reciprocal rights of readers to peruse and purchase

them. Where, as here, appellees' own First Amendment rights are at stake, no grounds exist, nor has Virginia suggested any, precluding adjudication of appellees' pre-enforcement First Amendment challenge.

In addition to its meritless attack on appellees' standing, Virginia has misconceived the legal standard that should govern appellees' claim on the merits. Where appellees' own rights are at stake the Court normally applies a compelling interest test to determine whether governmental regulation passes First Amendment muster. If appellees' conduct is found to be protected then the offending portion of the statute may not be applied to appellees or others engaging in similar protected activity. Only if appellees' conduct is not found protected under the compelling interest standard does the Court resort to the substantial overbreadth doctrine of Broadrick v. Oklahoma, 413 U.S.

601 (1973), to determine whether the amendment is substantially overbroad as applied to persons not before the Court.

ARGUMENT

I

BOOKSELLERS WHOSE ACTIVITIES ARE DIRECTLY REGULATED, AND BOOK PUBLISHERS WHOSE REVENUES WILL BE REDUCED AS A RESULT OF THE DISPLAY AMENDMENT, HAVE STANDING TO MAINTAIN THIS ACTION

In a wide range of contexts since at least Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court has regularly sustained the Article III judicial power to entertain pre-enforcement challenges to criminal statutes or administrative regulations which will predictably affect a plaintiff's business operations or profits. The fundamental principles on which those cases rest, sufficient in themselves to establish appellees' standing, are augmented here by the special considerations for challenges to statutes

which affect expressive First Amendment freedoms. Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984). Those considerations allow appellees here, who have standing to assert their own rights, to raise the correlative rights of adult and minor readers as well.

A. Article III Has Repeatedly Been Held Satisfied In Pre-Enforcement Challenges By Those Whose Day-To-Day Business Affairs Are Predictably Threatened By Allegedly Unconstitutional Statutes Or Regulations

To establish standing to challenge governmental action, a party must "'show that he has personally suffered some actual or threatened injury,' that the injury 'fairly can be traced to the challenged action,' and that the injury 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472

(1982) (citations omitted). The injury must be "'distinct and palpable,'" rather than "'abstract' or 'conjectural' or 'hypothetical,'" Allen v. Wright, 468 U.S. 737, 751 (1984), so that it gives the challenging party a "personal stake in the outcome of the controversy." Larson v. Valente, 456 U.S. 228, 238-39 (1982).

Because the type of injury required for standing is "not susceptible to precise definition," the application of the constitutional standing requirement cannot be reduced to a "mechanical exercise." Determining standing in any particular case relies heavily on comparison of the facts of a case to prior standing decisions, and on "clarifying principles or even clear rules developed in prior cases." Allen v. Wright, 468 U.S. at 751-52. This Court's prior decisions, and the principles and rules developed in those

decisions, clearly establish appellees' standing here.

At one end of the spectrum, the Court has denied standing under the related Article III doctrines of standing and ripeness, reasoning that the injury claimed is too conjectural and hypothetical to present a live case or controversy. In such cases, the governmental power challenged is merely discretionary, and it is far from certain that it would ever be applied to or affect the plaintiffs before the Court. Four representative cases exemplify the controlling principles.

In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court found no standing to review an assertion of a discretionary power to impose certain choke-holds on certain arrestees, reasoning that it was uncertain that the provision would ever again be applied to the plaintiff. In Babbitt v.

United Farm Workers, 442 U.S. 289, 304 (1979), the Court found no standing to review a discretionary power granted farm employers to bar access to farm workers by labor organizers, because it was "conjectural to anticipate that access will be denied." In Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 163 (1967), the Court found no standing to challenge a discretionary power to suspend food additive certification if manufacturers denied access to FDA inspectors, since "we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." And in Communist Party v. SACB, 367 U.S. 1, 70, 78-79 (1961), the Court declined to review certain provisions of a statute merely authorizing the Attorney General to take specified measures concerning certain organizations.

At the other end of the spectrum lie challenges to assertions of governmental power which are not discretionary but regulatory -- i.e., intended to require businesses or particular groups to conform immediately their usual conduct to new standards of behavior.

When faced with pre-enforcement challenges to measures, whether criminal or civil, which are intended to and predictably will regulate the conduct of actors in discrete segments of society, the Court has routinely and unhesitatingly found standing. Those cases, and the rules and principles the Court has identified in them, make plain that appellees' standing here is not open to serious question.

As early as Pierce v. Society of Sisters, 268 U.S. 510 (1925), this Court granted injunctive relief against enforcement of a statute which when enacted and first

challenged would not become effective for four more years. Standing was amply established because "without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property." 268 U.S. at 531. State officials had expressed no more than a general interest in enforcing the law requiring students to attend public schools (when it would become effective four years after enactment), and the opinion of the Court discloses no specific threat against the plaintiffs. Significantly, the Court noted that the judicial power to forestall future injury which would predictably flow from such a statute was not novel even in 1925: "Prevention of impending injury by unlawful action," the Court unanimously observed, "is a well recognized function of courts of equity." 268 U.S. at 536.

Cases upholding standing for similar pre-enforcement challenges to regulatory statutes, where injury would predictably flow from compliance with the newly required norms of conduct, are legion since Pierce. Perhaps the most celebrated and carefully analyzed such decision was written by Justice Harlan for the Court in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), a companion decision to the Toilet Goods discretionary power case, discussed above at p. 12, in which standing was denied. The contrast between the two cases usefully indicates why standing is so plainly available here.

Abbott Laboratories granted a drug manufacturer standing to challenge a statute and regulations barring the sale of proprietary drugs without also placing the established generic name of the drug on the label, reasoning:

> [The regulation] has a direct effect on the day-to-day business of all prescription drug companies; its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. As the District Court found on the basis of uncontested allegations, 'Either they must comply with the every time requirement and incur the costs of changing over their promotional material and labeling or they must follow their present course and risk prosecution . . .'
>
> [T]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions. Compare Columbia Broadcasting System v. United States, 316 U.S. 407; 3 Davis, Administrative Law Treatise, c. 21 (1958).

387 U.S. at 152, 154. In the companion case, Toilet Goods, Justice Harlan distinguished the discretionary power there under review, for which standing was not found, with the

mandatory regulations at issue in Abbott Laboratories, for which standing was recognized:

> The regulation challenged here is not analogous to those that were involved in Columbia Broadcasting System, supra, and Storer, supra, and those other color additive regulations with which we deal in Gardner v. Toilet Goods Assn., post, p. 167, where the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs. See also Federal Communications Comm'n v. American Broadcasting Co., 347 U.S. 284.
>
> This is not a situation in which primary conduct is affected -- when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae; no advance action is required of cosmetics manufacturers.

387 U.S. at 164.

The principles applied in Pierce and Abbott Laboratories have repeatedly been invoked to uphold standing in cases where businesses or economic organizations chal-

lenge recently promulgated (or, as in Pierce, not-yet-effective) regulation which would predictably affect profits or require expenditures to conform. See, e.g., Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 418-19, 422-23 (1942) (standing for network to challenge regulation barring licenses under specified conditions even though no license had in fact been denied or revoked, since such rules "have the force of law before their sanctions are invoked as well as after," and "the expected conformity to them causes injury cognizable by a court of equity"); Bantam Books v. Sullivan, 372 U.S. 58, 62 n.4 (1963) (standing for out-of-state book publishers to challenge state morality commission's notification to in-state distributor that certain books were "objectionable for . . . display for youths eighteen years of age [and younger]," even though no notices had yet been directed to

publisher); Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343-44 (1977) (standing for organization to challenge statute barring certain labels on shipped apples, where members' compliance with statute would require business expenditures to conform to required conduct); Babbitt v. United Farm Workers, 442 U.S. at 299-303 (standing to challenge statutory provisions regulating labor election procedures and consumer publicity, since challenged provisions were "sure to work the injury alleged" and "fear of criminal prosecution under [the] allegedly unconstitutional statute [was] not

imaginary or wholly speculative"); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985), aff'd mem., 106 S. Ct. 1172 (1986) (standing for booksellers and publishers to bring a pre-enforcement challenge to an ordinance providing for civil rights actions against booksellers where compliance would cause booksellers not to sell constitutionally protected books).[2]

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[2] See also Frozen Food Express v. United States, 351 U.S. 40 (1956) (standing for claim that business would be affected by regulation declining to exempt plaintiff from ICC supervision); United States v. Storer Broadcasting Co., 351 U.S. 192, 198 (1956) (standing to challenge regulation that no television licenses would be granted to applicants already owning five such licenses even though no specific application was before the Commission); Baggett v. Bullitt, 377 U.S. 360 (1964) (standing for faculty and staff members to challenge statutes requiring oaths by state employees, since the statutes forced plaintiffs either to comply with arguably unconstitutional statutes or risk prosecution) (White, J.); Epperson v. Arkansas, 399 U.S. 97, 100 (1968) (standing for teacher to challenge Arkansas criminal statute barring teaching of evolution);

(Footnote continued)

The Court does not require specific enforcement measures or particularized threats against plaintiffs in such cases, as

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(Footnote continued)

Doe v. Bolton, 410 U.S. 179, 188 (1973) (standing for physicians to challenge criminal abortion statute absent particularized threats of prosecution, where the statutes challenged were "recent and not moribund"); Buckley v. Valeo, 424 U.S. 1, 11-12 (1976) (standing for individuals and organizations to challenge comprehensive election financing reform statute prior to effective date of statute, since statute intended to regulate their conduct); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 62 (1976) (standing for physicians to challenge criminal abortion statute absent particularized threats of prosecution, since statute intended to regulate physician conduct); Pacific Gas & Elec. Co. v. Energy Resources Comm'n, 461 U.S. 190, 200-03 (1983) (standing for utilities to challenge statute imposing moratorium on certification of new nuclear power plants until development and approval of waste disposal techniques); Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 579-82 (1985) (standing for chemical companies to challenge statutory requirement that certain claims they had not yet brought be adjudicated in arbitration); Edwards v. Aguillard, 55 USLW 4860 (U.S., June 19, 1987) (standing for teachers to bring a pre-enforcement challenge to a law forbidding the teaching of evolution in public schools unless accompanied by instruction in the theory of creation science).

it does where an individual challenges a broad-based criminal statute that is neither regulatory in nature nor aimed at a discrete segment of the population. Cf. Steffel v. Thompson, 415 U.S. 452 (1974). The recent enactment of a regulatory measure itself provides the certainty that enforcement is intended; the legal obligation to comply with the regulatory measure creates direct and immediate injury-in-fact. A "case or controversy" exists by virtue of the governmental demand that economic actors conform their usual conduct to new standards of behavior that are arguably illegal or unconstitutional. The traditional powers of equity, and the Declaratory Judgment Act whose very purpose was to provide "an alternative to pursuit of the arguably illegal activity," S. Rep. No. 1005, 73rd Cong. 2d Sess., 2-3 (1934), quoted in Steffel v. Thompson, 415 U.S. at 480 n.1 (Rehnquist, J., concurring),

amply support the judicial power to resolve such disputes prior to actual enforcement.

B. Appellees Have Standing Under The Pre-Enforcement Regulatory Standing Cases

Appellees -- the American Booksellers Association, the Association of American Publishers, the Council for Periodical Distributors Association, the National Association of College Stores, and two retail book stores in Virginia -- plainly have standing under the decisions and principles canvassed above. The District Court's finding of fact, undisturbed by the Court of Appeals, establish that

> the average general bookstore in the Northern Virginia area carries a significant percentage of materials (varying between 5-25%) that are "harmful to juveniles" as defined in the statute. The books that fall within the restrictions come from a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health. Most of these books come

> within the statute's fairly broad ambit on the basis of their content. However, the Court finds that the covers of some books and magazines, as sexually explicit "pictures" and "photographs" under the statute, are also covered by the statute.
>
> In order to comply with the 1985 amendment, bookstores are faced with approximately four choices. First, a bookstore could simply bar all persons under the age of 18 from its store. . . .
>
> Second, the store could create an "adult only" section in order to display the proscribed material. . . .
>
> Third, the bookstore could simply limit its inventory to books not regulated by the new law. . . .
>
> Finally, the bookstore could place all of the proscribed material behind a counter where they would not be displayed to the public.

617 F. Supp. 699, 702-03 (E.D. Va. 1985).

The Court of Appeals properly analyzed these facts, and the impact of the ordinance on booksellers in Virginia (and by extension

the impact on periodical distributors and publishers as well).

> We agree with the district court that the Booksellers have standing to challenge the amendment. The Booksellers have shown a legitimate concern that the amendment will be implemented so as to infringe on their first amendment right of "free speech." This is more than a concern merely "held in common by all members of the public." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220 (1974). There is little doubt that compliance with the amendment threatens the Booksellers with economic injury; each of the methods of compliance suggested by the Commonwealth would interfere with the Booksellers' marketing methods. See Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970). Additionally, the mere display of proscribed materials in a manner allowing juveniles access violates the statute. To avoid criminal liability, the Booksellers must evaluate the content of all types of printed matter and then prevent minors from having the opportunity to examine and peruse those materials deemed harmful.

> If the Booksellers attempt to comply with the amendment, they face economic injury; if the booksellers continue to conduct their business in their normal fashion, they face the prospect of prosecution.

802 F.2d 691, 694 (4th Cir. 1986).[3] These facts are virtually indistinguishable from those in Abbott Laboratories v. Gardner, Hunt v. Washington State Apple Advertising Comm'n, Babbitt v. United Farm Workers, and the other cases cited above at pp. 17-21. In the language of Abbott Laboratories, booksellers in Virginia:

> either . . . must comply with the . . . requirement and incur the costs of changing over their [practices] or they must follow their present course and risk prosecution . . . [T]he regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail [to do so] they are quite clearly exposed to the imposition of strong sanctions.

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[3] The standing of the organizational appellees are more fully discussed infra at 29-30.

387 U.S. at 152, 154.

Contrary to Virginia's hypertechnical attempt to undercut the findings of fact on which both standing determinations below rests, see Edwards v. Aquillard, 55 USLW 4860 (U.S., June 19, 1987) (White, J., concurring), there was no need for a lengthy trial to arrive at a list of particular books affected, or to await the display amendment's effective date. The display amendment was not legislation in the air, or an authorization of governmental actions that might never be used. It was intended to go beyond Virginia's existing prohibition on sales to minors by barring display of such books "in a manner whereby juveniles may examine and peruse" them.

C. First Amendment Considerations Buttress Appellees' Standing To Raise Their Own Rights And The Rights of Readers

Compounding its confusion over how the overbreadth doctrine applies to the merits, which we address in Point II below, the Commonwealth of Virginia contends that appellees lack "standing" to raise the rights of others (whether other booksellers and publishers or readers). They reach this conclusion by purporting to "balance" the overbreadth doctrine against some defined interest in "comity."

Virginia's argument is at odds with numerous decisions of this Court, which make clear that appellee booksellers and publishers are entitled to claim that the display amendment is not a valid restriction of protected expressive activity -- their own and that of readers and other booksellers and publishers -- because it "reaches too far,"

Brockett v. Spokane Arcades, 472 U.S. 491, 504 (1985), and is not narrowly tailored to advance the compelling governmental purpose the state identifies.

Virginia's disquisition on third-party standing also addresses an issue not presented. As organizations of publishers and booksellers whose members will be predictably injured by enforcement of the display amendment, appellees' own rights and interests are coextensive with those of sellers and publishers of books in Virginia (who may not be members) and of readers. Since Bantam Books v. Sullivan, 372 U.S. at 58, the Court has recognized that the rights of readers are precisely reciprocal to those of publishers or booksellers. The First Amendment right of a publisher to have its books perused by and sold to readers without governmental interference, or of a bookseller to sell books free of such interference, is simply the other side of the right of readers

to peruse and purchase those books. As Professor Emerson reminds us, the First Amendment guarantees not just individual rights in isolation, but a system of free expression.

Accordingly, in considering previous restrictions on First Amendment activity, the Court has consistently considered the interests of both readers and booksellers (or more generally, audience and speakers) interchangeably, without engaging in the prudential standing analysis that is required in other contexts where the rights of a plaintiff are not inextricably intertwined with others. See, e.g., Brockett v. Spokane Arcades, 472 U.S. at 491 (considering challenge by movie theater owners to overly broad obscenity statute); Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (the right of a speaker to engage in commercial speech is reciprocal to the substantial interest of the listener

"in assuring informed and reliable decision-making"); Kleindienst v. Mandel, 408 U.S. 753 (1972) (inviter's First Amendment rights reciprocal to those invitees would have if they were citizens); Procunier v. Martinez, 416 U.S. 396 (1974) (letter recipient's standing to raise interests of senders); see also Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 958-59 (1984) (adjudication of the facial validity of a statute necessarily entails consideration of the statute's breadth, but no "standing" question is thereby presented). Thus, the Court need not undertake the prudential third-party standing analysis of Warth v. Seldin, 422 U.S. 490 (1975); appellees' challenge already and necessarily squarely and fully presents the relevant considerations.

Even if the prudential standing issue were raised, moreover, appellees' ability to invoke the First Amendment interests of

others as a basis for striking down the display amendment on its face follows directly from Secretary of State v. Munson, 467 U.S. at 955-58. There, in lieu of determining whether a Maryland statute regulating charitable solicitation affected a paid professional fundraiser's own First Amendment rights, the Court squarely held:

> [W]here the claim is that a statute is overly broad in violation of the First Amendment, the Court has allowed a party to assert the rights of another without regard to the ability of the other to assert his own claims and "'with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" Broadrick v. Oklahoma, 413 U.S., at 612, quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). See also Schaumburg, 444 U.S., at 634 ("Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court").

> The fact that, because Munson is not a charity, there might not be a possibility that the challenged statute could restrict Munson's own First Amendment rights does not alter the analysis. Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society -- to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. The crucial issues are whether Munson satisfies the requirement of "injury-in-fact," and whether it can be expected satisfactorily to frame the issues in the case. If so, there is no reason that Munson need also be a charity. If not, Munson could not bring this challenge even if it were a charity.

467 U.S. at 957-58. See also id. at 957 n.7; Craig v. Boren, 429 U.S. 190, 192-97 (1976) (considering 18-20 year-old males' rights in facial challenge by vendor of beer to validity of statutory ban on sales to such minor males); Eisenstadt v. Baird, 405 U.S. 438,

443-46 (1972) (considering minor's interests in facial challenge by advocate who distributed contraceptive foam to minor).

Since appellees do not rely solely on these third-party interests, as did Munson, the beer vendor in Craig, and Baird, but are instead seeking to vindicate their own First Amendment rights, their standing to raise the question whether the display amendment overbroadly infringes First Amendment rights of booksellers, publishers, and readers generally is even clearer here than in those cases. Short of overruling Munson and a host of its predecessors, there is simply no basis -- certainly Virginia suggests none -- that would warrant the Court's refusal to consider the practical impact of the display amendment on the entire range of expressive activity that it applies to and is likely to affect.

Even to analyze the issue as one of "standing" to raise third-party rights, as

Virginia has, is a misnomer, as the Court recognized in Munson. 467 U.S. at 965 n.13. There is no question that appellees have suffered injury-in-fact. Properly viewed, appellees are not seeking to vindicate claims of unspecified third parties, as to which a genuine issue of standing would arise, but rather their own individual right to have their own protected activity governed only by a constitutional statute. See Brockett v. Spokane Arcades, 472 U.S. at 504 (approving pre-enforcement facial invalidation, limited "to the extent that [the statute] reaches too far," where "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish. . . ."); see generally Monaghan, "Overbreadth," 1981 Sup. Ct. Rev. 1 (1982), cited in Secretary of State v. Munson, 467 U.S. at 959.

II

THE DISPLAY AMENDMENT'S OVERBROAD RESTRICTION ON THE DISPLAY OF BOOKS DEFINED AS "HARMFUL TO JUVENILES" IS INVALID UNDER THE COMPELLING INTEREST STANDARD

In addition to its meritless attack on appellees' standing, Virginia has fundamentally misconceived the legal standard by which appellees' claims must be judged. This is not a case -- like Broadrick v. Oklahoma, 413 U.S. 601 (1973) or New York v. Ferber, 458 U.S. 747 (1982) -- where plaintiffs unable to assert their own rights seek invalidation of a broad statutory scheme. Instead, appellees here have shown that their own First Amendment rights will be impaired by the display amendment. Accordingly, the analysis the Court must undertake stems not from Broadrick, but rather from the core compelling interest standard applicable to statutes directly impairing a plaintiff's expressive activity. See, e.g., United States v. Grace, 461 U.S.

171 (1983); Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

To safeguard the fundamental principles of free expression, the Court routinely permits litigants to challenge statutes that, on their face, overbroadly and unconstitutionally restrict protected First Amendment activity. See, e.g., City of Houston v. Hill, 55 USLW 4823 (U.S., June 15, 1987) (ordinance prohibiting verbal interruptions of police); Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 55 USLW 4855 (U.S., June 15, 1987) (proscription of expressive activity at airport); Brockett v. Spokane Arcades, 472 U.S. 491 (1985) (statute proscribing the dissemination of "lewd" or "lustful" matter); United States v. Grace, 461 U.S. 171 (1983) (statute prohibiting free expression in or about the grounds of the Supreme Court); NAACP v. Button, 371 U.S. 415 (1963) (statute

designed to regulate solicitation by attorneys); Marsh v. Alabama, 326 U.S. 501 (1946) (statute designed to prohibit leafletting on the streets of a company town); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute designed and having the effect of restricting the dissemination of religious literature).

It has long been settled that when plaintiffs establish an infringement of their own protected First Amendment activities, "the state may prevail only upon showing a subordinating interest which is compelling," Bates v. City of Little Rock, 361 U.S. 516, 524 (1960), and by further showing that the means chosen to achieve the compelling interest are narrowly drawn. See Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 637-39 (1980); see, e.g., Bates v. State of Arizona, 433 U.S. at 383 (prophylactic ban on attorney advertising not narrowly tailored to achieve the state's

compelling interest in preventing the ills that flow from some advertisements). Placing the burden on the state to justify any infringement of fundamental rights by compelling necessity preserves First Amendment freedoms from statutes that "would create an unacceptable risk of the suppression of ideas," City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 797 (1984), or that would allow "the hand of the censor to become unduly heavy." New York v. Ferber, 458 U.S. 747, 756 (1982).

When the plaintiff's own First Amendment activity is protected from unconstitutional infringement, either because the statute lacks a compelling objective or because the means chosen to achieve a compelling objective are not narrowly drawn, the inquiry ends, and that portion of the state law unconstitutionally infringing on protected First Amend-

ment activity may not be applied to plaintiffs or to others.

In United States v. Grace, for example, the Court considered a criminal statute that made it "unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 461 U.S. at 173 n.1. Because the government was unable to demonstrate that the statute as applied to conduct like plaintiffs' was narrowly tailored to serve a compelling interest, the Court facially invalidated the portion of the statute that prohibited expressive activity on the sidewalks in front of the Supreme Court building. See also Bates v. City of Little Rock, 361 U.S. 516 (invalidating statute compelling disclosure of an organization's membership list);

Speiser v. Randall, 357 U.S. 513 (1958) (invalidating statute requiring claimants for veterans' property tax exemption to declare loyalty to the United States); cf. Edwards v. Aquillard, 55 USLW 4860 (U.S., June 19, 1987) (invalidating statute requiring equal time for the teaching of creation science).

Where the state meets its burden of proving that the legislation as applied to plaintiff's own conduct is narrowly drawn to achieve a compelling state interest such that plaintiff's conduct is unprotected, or where the question of whether the plaintiff's own conduct is protected is not reached, e.g., Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc., 55 USLW at 4855, plaintiff may facially invalidate a state law, in whole or in part, only by resort to the overbreadth doctrine. See New York v.

Ferber, 458 U.S. 747, 767-74 (1982).[4]

The overbreadth doctrine supplements the usual compelling interest test by permitting a plaintiff to proceed with a facial challenge against a statute infringing on First Amendment freedoms even where conduct could have been regulated under a properly drafted statute. The doctrine reflects the Court's adherence to liberally allowing challenges to statutes that endanger First Amendment freedoms. The overbreadth doctrine, however, is an exception to "[t]he traditional

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[4] Amici recognize that the Court has, on occasion, referred to the overbreadth doctrine in cases in which the plaintiff's own conduct was constitutionally protected, as well as cases in which it was not. At least since Munson, however, it is clear that the need to demonstrate "substantial" overbreadth only applies in the latter situation. 467 U.S. at 965 n.13. When a statute lacks even a constitutional "core," and is therefore invalid "in all its applications," the Court has applied traditional compelling interest scrutiny. Id. at 967-68. That distinction, so carefully explained in Munson, id. at 964-65, is entirely overlooked by appellants here.

rule . . . that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court." Ferber, 458 U.S. at 767. Application of the overbreadth doctrine is tempered by the Court's concern that a plaintiff whose conduct is unprotected may bootstrap itself to others whose conduct is protected and escape prosecution even where the statute has a wide range of proper applications.

New York v. Ferber, on which Virginia principally relies, illustrates the difference between a First Amendment claim where plaintiffs are asserting their own rights and a claim that relies on the overbreadth doctrine -- a difference which Virginia's brief here simply ignores. In Ferber, the Court rejected a criminal defendant's challenge to a statute designed to prevent the exploitation of

children in the production of visual pornography. The defendant was found guilty of engaging in the dissemination of child pornography when he sold films devoted almost exclusively to depicting young boys masturbating.

The Ferber Court first concluded that the defendant's conduct was not protected speech under the compelling interest test. 458 U.S. at 753-66. Only then did the Court address the defendant's claim that because the New York statute interfered with the protected First Amendment rights of others not before the Court he should escape punishment even though his own conduct was unprotected. 458 U.S. at 767-74.

By contrast, when it facially invalidated a state disciplinary rule prophylactically banning attorney advertising in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Court applied the compelling interest test after finding that plaintiff's own

advertising was protected by the First Amendment. 433 U.S. at 381-82. Similarly, in United States v. Grace, 461 U.S. 171, 181-82 (1983), the Court struck down that portion of the statute that applied to appellees' conduct upon finding that the plaintiffs' own conduct was protected under the compelling interest test.

Ferber, Bates and Grace make plain that the standards governing a facial challenge by a plaintiff whose conduct is found to be protected by the First Amendment are different than the standards used to evaluate a facial challenge under the overbreadth doctrine by one whose conduct is not plainly protected. Where plaintiffs' own rights are unconstitutionally infringed, the Court applies the historically developed test which places the burden on the state to prove "a compelling interest" and "a narrowly drawn statute." If plaintiffs are successful, that portion of the

statute which would have continued to interfere with protected conduct is found to be facially invalid and may not be applied either to plaintiffs or to others.

Here, whether the Court relies on the compelling interest standard or the overbreadth doctrine standard, the display amendment cannot withstand constitutional scrutiny. Even under the overbreadth doctrine, appellees amply demonstrated below, and the lower courts expressly found, that the unconstitutional applications of the display amendment would have a substantial effect on the unrestricted display of and access to constitutionally protected reading materials, and was not subject to acceptable narrowing construction.

As more fully developed in the brief submitted by appellees and by amicus Freedom to Read Foundation, we agree that the display amendment is also invalid under the compelling

interest test. A statute criminalizing the mere display of constitutionally protected books in places where anyone under eighteen has access, merely because those books might be found "harmful" to some minors, is the epitome of a statute that sweeps far too broadly.

Most significantly, no showing was made that Virginia's restriction on sales was ineffective in averting harm to minors; nevertheless, Virginia capitulated to the relentless demands of censorship by requiring measures that would necessarily and inevitably deter the perusal and purchase of books not only by certain minors for whom the books are allegedly "harmful," but by mature minors and adults as well.

Since the wholesale removal of fiction and nonfiction books from the shelves of retail outlets in Virginia or their isolation in stigmatizing "adults only" sections are

not narrowly tailored responses to meet the state interest asserted by Virginia, the display amendment is facially invalid, and the judgment of the Fourth Circuit should be affirmed.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

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Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA,
Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR *AMICUS CURIAE* FREEDOM TO READ FOUNDATION IN SUPPORT OF APPELLEES

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BRIEF FOR *AMICUS CURIAE* FREEDOM TO READ FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS

The Freedom to Read Foundation (Foundation) was established in 1969 by the American Library Association (ALA), the oldest and largest library association in the world and the chief voice of the modern library movement in North America. A nonprofit organization, the ALA represents more than 45,000 librarians, library trustees, educators, and library institutions. The purposes of the nonprofit Foundation are to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

Librarians have long been aware that government censorship can take many forms and is not limited to direct prohibitions on speech. The First Amendment safeguards speech not only against outright assaults, but also against the eroding force of regulation that burdens and inhibits access to speech. Recognizing the insidious effects of regulations that burden access to speech by imposing so called "inconveniences," the ALA has made protection of "the *free flow* of information and ideas . . . [t]he central thrust of the Library Bill of Rights." *ALA Interpretation of the Library Bill of Rights* (Jan. 27, 1982). *Accord Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring) ("[The central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or a book might convey."). The Foundation is participating in this case because Virginia's display law is fundamentally at odds with this principle.

The Foundation is also participating because it is gravely concerned that if Virginia's display law is found

constitutional, states and localities will impose similar restraints on display of speech materials in the Nation's libraries. Although Virginia's law is limited to display for "commercial purposes," similar laws encompass libraries as well. *E.g.*, Ariz. Rev. Stat. Ann. § 13-3507. And if Virginia's law is upheld, states would almost certainly be free to impose the same burdens on libraries (indeed, some courts have held that the equal protection clause forbids states from creating special exemptions for libraries). This concern is not chimerical. History has shown that if a community will not tolerate certain speech in privately owned places such as bookstores, it will not show greater tolerance toward similar speech in public libraries.

INTRODUCTION AND SUMMARY OF ARGUMENT

During its long struggle to develop a workable test for obscenity, the Court has frequently emphasized that state obscenity statutes "must be carefully limited" to avoid burdening or chilling constitutionally protected speech. *E.g.*, *Miller v. California*, 413 U.S. 15, 23-24 (1973). The danger to First Amendment values is even greater when states attempt to regulate speech that is not obscene for adults and thus is constitutionally protected, but is deemed "harmful to minors." Because such regulation is not limited to hard core depictions of specifically defined sexual conduct, it can arguably encompass any speech concerning human sexuality, including a vast amount of constitutionally protected speech.

In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited the sale to minors of materials "harmful to minors" but imposed no burden on adult access to this speech. In contrast, Virginia's display statute directly burdens adult access to constitutionally protected speech by making it a criminal offense to display to adults materials deemed "harmful to minors" in any manner "whereby juveniles may examine and peruse" the material. Although the State concedes that its interest in the display statute is far narrower than

the interest asserted in *Ginsberg*, the burden the statute imposes on the First Amendment rights of adults is immeasurably greater.

In *Point I*, we will show that this Court has upheld regulations that burden the First Amendment rights of adults in order to shield minors from harmful speech only in very limited circumstances. To satisfy the First Amendment, such laws must meet both of the following requirements. First, the law must substantially further the state's interest in protecting minors from speech that is harmful to them. Second, the law must be "reasonably restricted" to furthering that interest. If the law instead substantially burdens the First Amendment rights of adults, it is unconstitutional.

The Court need not decide in this case whether a state could ever pass a display law that meets these requirements, for it is quite clear that Virginia's display statute is not reasonably restricted to furthering the interest identified by the State. As explained in *Point II.A*, the State has effectively conceded that its display statute was *not* passed to prevent momentary review of any sexually explicit materials by minors; instead the State is concerned about a "miniscule" amount of sexually explicit materials, and the statute's purpose is to prevent detailed inspection of these materials that may result from ostentatious displays. While narrowly defining the purpose of the statute, the State has also conceded that the literal terms of the statute are far more encompassing than necessary to accomplish this narrow state interest. The State's argument then collapses into a contention that its display statute is "reasonably restricted" because the statute's literal language can be disregarded by employing a "narrowing construction"—a contention that is little more than an invitation for this Court to rewrite the statute. Based on the State's concessions, this Court should strike down the Virginia statute on the ground that it is not reasonably restricted to the State's asserted interest.

In *Point II.B*, we will show that the Virginia statute is also unconstitutional because it substantially burdens the First Amendment rights of adults. Initially, it should be understood that as a practical matter compliance with the statute requires that virtually all material discussing or depicting sexuality or sexual conduct be treated as subject to its prohibitions. It would be impossible even for experts to determine which books and other materials with sexually explicit discussions are "harmful" to the "average" minor. When required to make this highly uncertain judgment about each of the thousands of books in a bookstore's ever-changing inventory that include some sexually explicit portions, many persons covered by the statute will simply choose to treat most, or all, materials with sexually explicit portions as subject to the statute's requirements. *Point II.B.1.*

In *Point II.B.2*, we will show that the burdens the display law imposes on speech subjected to its requirements vastly exceed those imposed by "sale to minor" laws. First, in contrast to sale to minor laws (which impose no burden on adults), the display law effectively requires bookstores and other persons covered to conspicuously identify materials subject to the statute's requirements as "Sexually Explicit—Harmful to Minors—For Adults Only," and then forces adults who wish to examine or purchase these materials to make their interest in sexually explicit material obvious to other patrons of those establishments. The statute thus directly impairs the "free flow" of constitutionally protected speech, *Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring), and substantially burdens and inhibits the exercise of First Amendment rights by adults. *Point II.B.2.a.* Second, although bookstores can comply with sale to minor laws by deciding *at the point of sale* whether particular materials being purchased by a minor are subject to the statute (and, if permitted by the statute, can take the minor's age into account), Virginia's display law requires that this determination be made about every book, magazine and other publication in a

bookstore's constantly changing inventory *prior to display*. It thereby imposes extraordinary burdens on the constitutionally protected activities of persons covered by the statute. *Point II.B.2.b.*

In *Point III*, we will explain that the issue raised in this case is a matter of grave concern to the nation's libraries and librarians. Although Virginia's statute directly restricts only displays for "commercial purposes," the parties have not argued that the limitation to commercial purposes is of constitutional significance. Accordingly, if Virginia's display statute is found constitutional, Virginia and other states may consider themselves free to impose the same burdens on public libraries (as some states have already done). In limiting its statute to commercial displays, Virginia has implicitly recognized that the imposition of such burdens on libraries is completely antithetical to the purposes of libraries. This Court should find that the imposition of those burdens on constitutionally protected activities, whether undertaken by libraries, bookstores or other persons, violates the First Amendment.

ARGUMENT

I. STATUTES BURDENING ADULT ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH IN ORDER TO SHIELD MINORS FROM THAT SAME SPEECH ARE NOT CONSTITUTIONAL UNLESS: A) THE LAW SUBSTANTIALLY FURTHERS THE STATE INTEREST IN PROTECTING MINORS, AND B) THE LAW DOES NOT SUBSTANTIALLY BURDEN THE FIRST AMENDMENT RIGHTS OF ADULTS.

In the State of Virginia's view, because it is constitutional to forbid selling to minors material that is "harmful to minors," *Ginsberg v. New York*, 390 U.S. 629 (1968), it necessarily must be constitutional to restrict the manner in which that material is displayed to adults and minors. This view ignores a fundamental difference between sale to minor laws, and display laws. A law forbidding the sale of certain material to minors does not burden adult access to those materials. Thus, in

Ginsberg there was no claim that a burden on the First Amendment rights of adults had been imposed. In contrast, Virginia's display statute directly burdens adult access to constitutionally protected speech by making it a criminal offense to display, either to adults or minors, material covered by the statute in any manner "whereby juveniles may examine and peruse" the material. The issue now before the Court is whether the burden this imposes on the First Amendment rights of adults violates the First Amendment.

This Court has on several occasions addressed the constitutionality of laws that burden the First Amendment rights of adults in order to shield minors from speech that is constitutionally protected for adults, but not for minors. In those cases, the Court has upheld the government regulation *only* if two requirements are satisfied. First, the law must substantially further the state's interest in protecting minors from speech that is harmful to them. Second, the law must be "reasonably restricted" to furthering that interest. If the law is not so restricted, and instead substantially burdens the First Amendment rights of adults, it violates the First Amendment.[1]

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[1] Appellant argues that this Court should analyze Virginia's display statute using the test that the Court has applied to time, place and manner restrictions. Recognizing that such restrictions cannot be based on the content of speech, *see, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975), appellant argues that Virginia's law is not intended to regulate the content of speech. This argument is unfounded for two reasons.

First, Virginia's statute plainly *is* content-based. The statute was enacted because of concern about the effects of speech having a certain content, and the statute's prohibition directly applies to speech having that content. Appellant's argument is really no more than a contention that this is a *permissible* content-based regulation because it is intended to protect children from harmful speech content; that argument does not warrant the conclusion that the statute is not content-based.

Second, appellant's suggestion that the display law is a "manner" restriction and should be reviewed using a less rigorous standard misconceives this Court's prior decisions concerning "manner" regulations. Although many regulations might be classified as "man-

Thus, in *Butler v. Michigan*, 352 U.S. 380 (1957), the Court reversed a defendant's conviction under a Michigan statute prohibiting the sale of "obscene, immoral, lewd or lascivious materials" that tended to "incite minors to violent or depraved or immoral acts" or manifestly tended to be morally corrupting. The trial judge had determined that the materials sold by the defendant had a "potentially deleterious influence upon youth." When the defendant appealed to this Court, the State argued that forbidding sale of such materials to adults, as well as minors, was required to prevent minors from having access to speech that was harmful to them. Without questioning the State's claim that the statute substantially furthered the state interest in protecting minors, the Court determined that the statute was "not reasonably restricted to the evil with which it is said to deal." 352 U.S. at 383. Because the statute also prevented *adult* access to speech that was constitutionally protected for adults, the Court unanimously ruled that it violated the First Amendment. 352 U.S. at 383.

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ner" restrictions in some sense of the word—including regulations that require speech to be inaudible, or in a foreign language—the Court has not used the time, place and manner test unless the "manner of the speech produces a detrimental 'secondary effect' on society," and the speech is not being regulated because of fear of its 'primary' effect"—that is, the effect the speech will have upon "those receiving the information." *Linmark Associations, Inc. v. Willingboro*, 431 U.S. 85, 94 (1977). Thus, the test has been used where the manner of speech caused secondary effects such as excessive noise, *Kovacs v. Cooper*, 336 U.S. 77 (1949), or neighborhood deterioration, *Renton v. Playtime Theatres, Inc.*, —— U.S. ——, 89 L.Ed.2d 29 (1986), *but it is clearly inapplicable to regulations designed to control the allegedly harmful effects that the speech itself may have on some people* (in the case of Virginia's display law, the effect of certain speech on minors). *See, e.g., Linmark*, 431 U.S. at 94; *Erznoznik* (reviewing ordinance restricting display of speech on drive-in theatre screens visible from public streets, Court did not suggest this was merely a "manner" restriction); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (reviewing statute providing that certain mail would only be forwarded to addressee upon receipt of written request from addressee, Court again did not suggest that this was a "manner" restriction).

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court reviewed an ordinance prohibiting drive-in theatres from showing films containing nudity on screens visible from public streets or other public places. To comply with the statute, drive-in theatres either had to prevent public display of such films—for example, by building fences to prevent viewing from public streets—or discontinue showing such films. The City of Jacksonville argued that the statute was "a reasonable means of protecting minors from this type of visual influence."[2] Despite the city's assertion of that interest, and despite the fact that the ordinance obviously furthered that interest and did not burden adult access to such films in theatres other than drive-ins, the Court found the ordinance facially unconstitutional. Although the ordinance did not prohibit drive-in theatres from showing films covered by the ordinance, but simply required that the films not be displayed on screens visible from public places, the Court recognized—without requiring supporting evidence in the record—that as a practical matter theatres would discontinue showing films covered by the statute to avoid this burden. Because many of these films were constitutionally protected for minors as well as for adults, the ordinance's restriction was "broader than permissible." 422 U.S. at 213.

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court again struck down a statute that burdened the First Amendment rights of adults in order to protect minors from supposedly harmful speech. The Court held that a statute prohibiting unsolicited mailing of contraceptive advertisements violated even the less stringent First Amendment standard applicable to commercial speech. Although the interest asserted by the state—"aiding parents' efforts to discuss birth control with their children"—was "undoubtedly substantial," the Court found that the statutory "means of effectuating this interest . . . provides only the most limited incre-

[2] Much of the film material encompassed by the Virginia display law probably was also covered by the Jacksonville ordinance.

mental support for the interest asserted." 463 U.S. at 73. The Court questioned the claim that many children had unrestricted access to material in the mailbox, and also reasoned that even if children had such access, parents already had to "cope with the multitude of external stimuli that color their children's perception of sensitive subjects." 463 U.S. at 73. Thus, the statute provided only a "marginal degree of protection" for the state's interest, and did not substantially further that interest. *Id.* Moreover, the statute was not "reasonably restricted" to advancing that state interest, but also burdened adult access to material "entirely suitable for adults" by prohibiting unsolicited mailings. *Id.* at 73-74. Although the statute did not prevent adults from having access to this material if they requested it, the Court concluded that the First Amendment did not allow the government to impose even this burden on adults. 463 U.S. at 69 n.18. As *Bolger* makes clear, if a statute does not substantially further the state's interest in protecting minors, even a minimal burden on adult access to unsolicited *commercial* speech violates the First Amendment.

Most recently, in *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987), the Court was asked to review the Tenth Circuit's holding that a nuisance statute punishing cable television programming that depicted "indecent material" violates the First Amendment and is preempted by federal law. The District Court in *Wilkinson* rejected the state's contention that the statute was constitutionally permissible because it furthered the state's interest in protecting minors from harmful material. The Court reasoned that the statute did not substantially further the state's interest, and would prevent adults from exercising their First Amendment rights. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985). The Court of Appeals adopted the reasoning of the District Court and affirmed. *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). The state appealed to this Court, again arguing, *inter alia*, that the statute was necessary to prevent children from hav-

ing unsupervised access to indecent material. This Court summarily affirmed the lower court's decision. *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987).

Underlying the holdings in *Butler*, *Erznoznik*, *Bolger* and *Wilkinson* is the recognition that First Amendment rights are "supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Thus, when the government burdens the First Amendment rights of adults for the asserted purpose of protecting minors from "harmful" speech, this asserted interest is not treated as a talisman but instead is subjected to the closest scrutiny. Unless the government regulation substantially furthers the state interest in protecting minors, and does so without imposing a substantial burden on the First Amendment rights of adults, this Court has uniformly held that the regulation violates the First Amendment.

Indeed, the *only* case in which the Court has found that a government regulation burdening the First Amendment rights of adults did substantially further the government interest in protecting minors and only insubstantially burdened the rights of adults, is *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In that case, the Federal Communication Commission had issued an order holding that a radio station's broadcast of a profane monologue in the early afternoon violated federal law; no formal sanctions were imposed, but the order was placed in the station's file and the station was warned against future violations. The Commission emphasized that the monologue was "broadcast at a time when children were undoubtedly in the audience," and that its order was a response to that "specific factual context" and was "never intended to place an absolute prohibition on the broadcast of this type of language." 438 U.S. at 732-33. Upholding the Commission's action in the context of this regulated industry, the Court emphasized that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and this media was "uniquely accessible to children, even those too young to read." 438 U.S. at 749.

In these circumstances, the Commission's regulation of profane broadcasting, which imposed no burden on broadcasts in evening hours, was found constitutionally permissible.[3]

In sum, only in the context of a regulated industry has this Court tolerated burdens on the First Amendment rights of adults imposed to protect minors from harmful speech, and even then, the restrictions were limited to certain hours during the day. As we will show in the following section, Virginia's display law is *not* reasonably restricted to the interest identified by the State, and *does* impose substantial burdens on the First Amendment rights of adults.

II. VIRGINIA'S DISPLAY LAW VIOLATES THE FIRST AMENDMENT BECAUSE IT IS NOT RESTRICTED TO THE NARROW INTEREST IDENTIFIED BY THE STATE, AND IMPOSES SUBSTANTIAL BURDENS ON THE FIRST AMENDMENT RIGHTS OF ADULTS.

A. The State Has Essentially Conceded That The Display Statute, As Written, Is Not Reasonably Restricted To Furthering The Narrow Interest Identified By The State.

Relying on this Court's holding in *Ginsberg* that government has an important interest in preventing unlimited sale to minors of materials that are "harmful to minors," the State argues that its display statute is required to substantially further a compelling state interest. A more careful review of the State's position, however, reveals that the interest being asserted by the State is extremely narrow. Indeed, throughout this litigation the State has made it extremely clear that it has *no* interest in prohibiting the broad range of speech covered by the terms of its display statute. And it has effectively conceded that the much narrower interest it does assert could be protected by a much narrower stat-

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[3] The Court also emphasized the "narrowness" of its holding, 438 U.S. at 750, and later reiterated in *Bolger* the narrowness of *Pacifica*'s holding. 463 U.S. at 74.

ute. This Court, like the courts below, should reject the State's invitation to rewrite and narrow the reach of its statute, and should find the statute unconstitutional based on the State's concession that its display statute is not reasonably restricted to furthering the interest identified by the State.

In explaining what the display statute is intended to regulate, the State has very narrowly defined its interest. First, although it is clear from the findings of fact in this case that a substantial percentage of the books and other inventory in an average bookstore have some material that is sexually explicit, concerns human sexuality or could otherwise be deemed "harmful to minors" under laws such as Virginia's statute, 617 F. Supp. at 702, the State has steadfastly maintained that it is concerned only about preventing display of a "miniscule" portion of this inventory. App. Br. at 16, 27, 29. Thus, it is quite clear that the State does *not* believe that the display of most sexually oriented materials is intrinsically, or even usually, "harmful to minors." The State's interest is restricted to preventing display of a very limited subset of that material.

Second, the State concedes that "not every display" of even this "miniscule" subset should be deemed illegal under the statute. App. Br. at 35. Although the statute by its terms prohibits display of harmful materials in any manner "whereby juveniles may examine and peruse" them, the State now claims that the statute should not be read "literally" and does *not* prohibit display of materials in a manner whereby minors "might" examine and peruse them. According to the State, it is interested in prohibiting *only* displays that create a "reasonably certainty" that the materials will be "'inspect[ed] in detail'" and "'analyze[d] carefully'" by minors.[4] Because only the most ostentatious displays could create a "reasonable certainty" of detailed inspection and analysis by minors, it is clear that the State is not concerned that

[4] *Id.* at 35 & n.9 (quoting *American Heritage Dictionary* (2nd College Ed. 1982)), 36.

routine shelving and display of even the core of harmful materials it has identified will cause harm to minors. Nor is the State concerned that fleeting glances, or momentary inspection, of those materials will cause harm to minors.

Third, after restricting its interest to protecting minors from ostentatious displays of a "miniscule" amount of sexually explicit materials, and urging that the statute be construed accordingly, the State urges this Court to further rewrite and limit the statute in a manner that would render it largely unenforceable. The State argues that those covered by the statute can "comply with [the law] without significantly interfering with [their] business practices" because, according to the State, bookstores need not segregate materials "harmful to minors" outside the reach of minors. *Id.* at 29. The State maintains that the statutes merely requires bookstores to place "warning tags . . . on the materials in question" or "color code[]" such materials. *Id.* It is obvious, and the lower court expressly found, that construed in this manner the statute "would not stop any determined juvenile from examining and perusing the materials" covered by the statute. 792 F.2d at 1266. Thus, the State's interest in the display statute is so minimal that it urges a facially implausible statutory construction that practically nullifies the statute's intended purposes. *See Point II.B.2.a., infra.*

Although the State has thus identified a very slight interest in regulating the display of a small subset of sexually oriented material in this manner—and in several places has indicated statutory language that could have been used to restrict the statute to achieving this interest—the reach of the statute is obviously not so limited. The statute is not restricted to prohibiting displays that create a "reasonable certainty" of "inspect[ion] in detail" by minors. Instead it prohibits displaying materials in *any* manner "whereby juveniles may examine and peruse" those materials. And persons covered by the statute cannot comply with the law by em-

ploying "warning tags" or "color coding," because if such actions are taken minors still "may examine and peruse" materials. Nor has language been employed that would restrict the statute to the "miniscule amount" of sexually oriented material about which the State professes concern. To the contrary, as shown *infra*, on its face the statute arguably encompasses virtually all sexually oriented material. In short, the State's contention that the statute can be construed as furthering only the very narrow objective identified by the State is nothing more than a request that the Court disregard in numerous respects the statute's literal language and radically rewrite the statute. In *Erznoznik*, this Court rejected an invitation to rewrite an overbroad statute, finding that the plain language of the statute was "not easily susceptible" to a narrowing construction. 422 U.S. at 216-17. *See also Webb*, 643 F. Supp. at 1554. Precisely the same result is required here.

B. The Virginia Display Law Is Also Unconstitutional Because It Imposes Substantial Burdens On The First Amendment Rights Of Adults.

We have shown that Virginia's display law is unconstitutional because the State has effectively conceded that it has only a limited interest in regulating this type of speech and could have accomplished its limited interest with a much narrower statute. Furthermore, even if the State had asserted a very broad interest in protecting minors from harmful speech, and even if this statute substantially furthered that interest as to minors, which it does not, the statute would still be unconstitutional because it substantially burdens the First Amendment rights of adults.

This Court has long struggled to limit the chilling effects of obscenity laws on protected speech. Regulation of material that is "harmful to minors" poses greater dangers to First Amendment values. Because such regulation is not limited to hard core depictions of specifically defined sexual conduct, it can arguably encompass almost any sexually oriented material, the overwhelming ma-

jority of which is constitutionally protected speech. In permitting states to prohibit *sales* to minors of material defined as harmful to them in *Ginsberg*, this Court upheld a statute that had no effect on the First Amendment rights of adults. The statute at issue there permitted booksellers to make judgments about the "harmful" nature of particular works at the *point of sale*, rather than forcing them to make advance determinations about their entire inventory. As the following discussion shows, Virginia's display law imposes immeasurably greater—and constitutionally impermissible—burdens on the First Amendment rights of adults.

1. ***In Order To Comply With The Display Law, Persons Covered By The Statute Will Treat Virtually All Books And Other Materials Discussing or Depicting Sexuality Or Sexual Conduct As Subject To The Law's Requirements.***

Compliance with the Virginia statute, as written, requires that virtually all material discussing or depicting sexuality or sexual conduct be treated as subject to its prohibitions. Even if persons covered by the statute had substantial resources and expertise in child sexuality—which they do not—it would be extraordinarily difficult for them to determine which of the materials in their establishments will be ruled by judges or juries to be "harmful" and therefore covered by the statute. Accordingly, instead of engaging in a laborious effort that would result in only the most uncertain and risky judgments, persons covered by the statute can be expected to avoid this futile undertaking and minimize the risk of prosecution, conviction and punishment by applying the statute's restrictions to most, and in many cases all, speech that includes discussions or depictions of sexuality or sexual conduct.

In the proceedings below, the district court made a factual finding, based upon the testimony of two local bookstore owners and a "careful review[]" of the exhibits, that "a significant percentage of materials (varying between 5-25%)" carried by an average general book-

store in Northern Virginia "are 'harmful to minors' as defined by the statute." 617 F. Supp. at 702. These materials included books covering "a wide variety of subject matters, such as romance, fiction, photography, best sellers, science fiction and health." *Id.* Most of these books came within the statute because of their written content. *Id.*[5]

The State has not explained how persons covered by the statute can confidently determine which materials with sexually explicit discussions are "harmful to minors." Nor did the State introduce any evidence to support its conclusory statements about the statute's limited scope. Instead, the State itself points out the uncertainties inherent in the statute by questioning appellees' witnesses on the ground that they were unaware of what the statute meant by "harmful to minors." This approach grossly misses the crucial point: bookstore owners will be uncertain about the meaning of the law, and will apply it to a substantial percentage of their inventory. Fear of criminal prosecution will only widen, not narrow, the effect that the statute will be given. Moreover, the trial judge in this case, fully apprised of the State's arguments that the statute's reach is more limited than a literal reading would imply, determined that the law *does* apply to a very substantial percentage of the material carried by an average bookstore. When a federal judge concludes that as much as 25% of the inventory in general interest bookstores is in fact covered by the law, bookstore owners—faced with the possibility of criminal penalties if they incorrectly decide materials are not "harmful to minors"—will reach similar or yet more censorious conclusions.

Furthermore, the State has not seriously disputed the fact that a very high percentage of books and other

[5] Similar factual findings were made in *American Booksellers Association v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986), where the court determined that "a significant percentage of adult reading material" was encompassed by a similar display statute and that "as a practical matter" the statute "would drastically reduce adults' selection of reading material." 643 F. Supp. at 1550.

reading, as well as viewing, materials include some sexually explicit discussions or depictions. For several reasons, persons covered by the display law cannot practically determine which of these sexually explicit materials are not subject to Virginia's display statute.

Initially, in contrast to obscenity statutes (which can only regulate materials that depict or describe " 'hard core' sexual conduct specifically defined by the regulating state law" [6]), Virginia's display law applies to any material that depicts or describes sexually explicit nudity, sexual conduct, or sexual excitement, and, taken as a whole, satisfies Virginia's three part definition of "harmful to minors." That definition, paraphrased, encompasses any of this material that: a) predominantly appeals to juveniles' shameful or unhealthy interest in sex; b) is patently offensive to community standards of what is suitable for juveniles; and c) lacks serious value for juveniles.[7]

Applying this three-part test to determine whether sexually explicit material is "harmful to minors" poses extraordinary problems. There is no consensus among experts, or the general public, about which childhood interests in sexuality are "healthy" and which are not, or about when and how sexually explicit information, whether educational or otherwise, should be made available to minors. Many people would argue that *any* material describing sexual conduct prior to adulthood, or outside of marriage, appeals to "unhealthy" interests in sex, and that it offends community standards to describe such conduct to minors.[8] Further, persons covered by the stat-

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[6] *Miller v. California*, 413 U.S. 15, 27 (1973); *see Jenkins v. Georgia*, 418 U.S. 153 (1974).

[7] *See* Va. Code § 18.2-390(6); *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794 (1985) (explaining meaning of "prurient interest" in sex).

[8] *See, e.g., Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (reviewing statute restricting speech "which approvingly portrays an adulterous relationship, quite without reference to the manner of its portray," 360 U.S. at 688). In fact, the Meese Com-

ute cannot be confident that material will be protected by the third prong—exempting materials with serious value for minors—because the value of any particular material might be found "beyond the comprehension of most minors." *Webb*, 643 F. Supp. at 1550. Faced with these problems, even an expert would have great difficulty deciding which sexually explicit materials do or do not meet the statute's definition of "harmful to minors."

These difficulties are greatly compounded by the fundamental differences among minors in different age groups.[9]

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mission on Pornography suggested that many people would even find it harmful to depict "a loving married couple engaged in mutually pleasurable and procreative" intercourse, because *any* public discussion of sex in a book or magazine "changes its character" and makes it a "public rather than private" act. Attorney General's Commission on Pornography, *Final Report* 340 (1986).

[9] Experts have long understood that sexuality begins to develop very early in childhood. A leading treatise on sexuality explains this deevlopmental process as follows: (1) "Sexuality is an integral and important part of our lives from the earliest day of infancy. Infants will curiously explore their bodies, fondle their genitals, engage in masturbation, and relate to others in sensual, intimate, or erotic ways." (2) "By age two or three children become aware of their gender"; they begin "to identify with their same-sex parent" and begin to "develop the gender-appropriate roles endorsed by the culture." (3) "By late childhood many children play games where they even fantasize being involved in marriage and family relationships. They may even express a desire for a brief period, to marry their opposite-sex parent." (4) Although children between the age of six and twelve are often thought "to be in the latency period of development . . . sexual development and interests are hardly dormant during this period. Children gain experience with masturbation and engage in sexual exploratory activities with same-sex and opposite-sex peers." (5) "In adolescence, the physical and hormonal changes of puberty occur. . . . First experiences with adult forms of sexual expression . . . may occur." S. McCary & J. McCary, *Human Sexuality* (3d Ed. 1984). *See also* M. Harmatz & M. Novak, *Human Sexuality* (1983); E. Morrison, K. Starks, C. Hundman, N. Ronzio, *Growing Up Sexual* (1980); *Human Sexual Development* (D. Taylor ed. 1970).

Apart from this basic understanding of child sexual development, however, this subject matter is one of substantial uncertainty and

The significance of these differences has been recognized by this Court,[10] as well as the Virginia legislature. Before passing the display law, the legislature expressly permitted retailers to consider the relative maturity of a minor in deciding whether to sell that minor a particular book or other material. The display law does not permit such individualized judgments. To comply with the law persons subject to the statute must either stop displaying materials if it is harmful to minors of *any* age group, or attempt to make a determination based on a hypothetical "average" minor. Because the differences between minors of different age groups are so fundamental—with respect to their sexual development, their capacity for informed choice, and even their ability to read—the latter approach is meaningless in this context.[11] A prudent person must assume that material would be covered by the statute if it would be harmful to *any* minor. Thus, if material would not be harmful to a 17-year old, but could be harmful to a five-year old, it would have to be treated as "harmful" under the statute (even though there is little risk that a five-year old would actually peruse the material). To determine whether particular material is "harmful," persons covered by the statute will have to determine the material's varying impact on minors of different

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disagreement among experts, as well as lay people. In particular, there is nothing approaching a consensus about which information and ideas, introduced at different ages, will lead to development of a healthy, or unhealthy, understanding of sexuality. *See, e.g.*, L. Constantine & F. Martinson, *Children and Sex* p. x (1981).

[10] *See, e.g., Erznoznik*, 422 U.S. at 21 n.11; *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 440 (1983); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982); *Fare v. Michael C.*, 442 U.S. 707, 727 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

[11] There is no practical way to hypothesize about an "average" minor, and determine which sexually explicit materials may be harmful to that minor. How, for example, is a bookseller to "average" a 17-year old minor and a 4-year old minor who cannot even read, and determine whether the written material in a book is harmful to this "average" minor? The statute provides no guidance on such issues.

ages, and treat the material as subject to the statute's requirements if it may be harmful to minors of any age.

For these reasons, it would be virtually impossible—even with substantial resources and expertise—to separate with any degree of accuracy sexually oriented materials that are "harmful" and thus covered by the statute from those that are not. And as a practical matter, booksellers and other persons covered by the statute have neither the resources, nor expertise, to even attempt to make this determination about their entire, constantly changing, inventory.[12] Because of the extraordinary time and expense required to make difficult and highly uncertain judgments about which particular books and other materials are "harmful to minors," the statute effectively compels booksellers simply to treat *all* materials that deal with sexuality as subject to the statute's requirements.[13]

In sum, although the State asserts an interest in restricting minors' access to a "miniscule amount" of books and other speech, its display statute sweeps far more broadly. Whether persons covered by the statute painstakingly attempt (at their peril) to determine which of their inventory conceivably could be considered "harmful to minors," categorically treat all materials with sexually explicit portions as covered, or simply restrict entire categories of literature, it is clear that a very broad range of constitutionally protected speech which the State has disclaimed any interest in regulating will be subjected to the display law's requirements.

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[12] Plaintiff Ampersand Books, for example, carries approximately 12,000 to 13,000 different books at any one time. In fact, there are "[a]pproximately 500,000 books . . . in print at any given time, and 50,000 new books are published every year. Obviously, bookstore owners cannot hope to read more than a minimal percentage of the book they stock." *Webb*, 643 F. Supp. 1550.

[13] Indeed, as we explain in Point II.B.2.b., *infra*, even if applied in this way, the statute imposes a substantial burden on booksellers, because booksellers will still have to review their entire inventory to determine which books have sexually explicit content.

2. *The Burdens The Display Law Imposes On Speech Vastly Exceed Those Imposed By Sale To Minor Laws, And Will Substantially Burden The First Amendment Rights Of Adults.*

a. *By limiting the manner in which speech can be displayed to adults, the statute impedes the "free flow" of constitutionally protected speech.*

Virginia's display statute makes it unlawful to display covered material to adults in any manner "whereby juveniles may examine and peruse" it. Notwithstanding the State's strained argument that there are many ways to comply with this statute, at the very least the statute clearly requires that all material it covers be identified, and an effective barrier be created to guard against the possibility that the material will be "examined" by minors. Whether this barrier takes the form of sealed wrappers on books and magazines, "adults only" sections in bookstores, or some other conspicuous form, the effect is the same: speech covered by the statute must be conspicuously identified as "Sexually Explicit—Harmful to Minors—For Adults Only." Adults who wish to examine or purchase those materials are thereby forced to make their interest in sexually explicit material obvious to other patrons.

Short of discontinuing sale of materials covered by the statute or barring minors from the premises entirely, the statute presents only two sure ways to comply: Placing all materials subject to the statute in a conspicuously designated "adults only" section of the establishment (and barring minors from that section), or sealing all such materials with wrapping. The lower court found as a fact that "many adults would be reluctant and embarrassed to browse in an 'adults only' corner of the store, and sales of books in this area would undoubtedly drop." 617 F. Supp. at 703. For exactly the same reason, many adults would be inhibited from purchasing in public material that is sealed because of its sexually explicit

nature.[14] The lower court's finding that such practices inhibit the exercise of First Amendment rights is well grounded in human experience: for many if not most people, sexuality and interest in sexuality is an extremely personal and private matter—forced to choose between conspicuously revealing that interest in public or foregoing First Amendment rights, many people will do the latter.

Justice Powell's concurrence in *Carey v. Population Services International, Inc.*, 431 U.S. 678 (1977), expressly recognized that laws requiring constitutional freedoms relating to sexuality to be exercised in public severely and impermissibly burden those freedoms. Although a law prohibiting mail purchases of contraceptives would prevent minors under age 16 from having unrestricted access to contraceptives, Justice Powell explained that this law also forced adults to purchase contraceptives in a public manner. He concluded that by publicizing this conduct, the law "heavily burdens constitutionally protected speech," and therefore was unconstitutional. 431 U.S. at 711. Because Virginia's display law conditions access to sexually explicit books and other materials in bookstores on the patron's willingness, in public, to express interest in materials conspicuously identified as sexually explicit, it also severely and impermissibly "burdens constitutionally protected freedom."

The State argues that display laws impose merely an inconvenience, leaving "ultimate access" to constitutionally protected speech unimpaired. The same argument was made and rejected in *Erznoznik* and *Bolger*, and it should be rejected here. This Court has long recognized that "[i]t is characteristic of the freedoms of expression . . . that they are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v.*

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[14] Even if the statute is "narrowly construed" as urged by the state, materials would have to be marked or placed in locations, e.g., blinder racks, that identify them as sexually explicit. Such an approach would impose the same stigma imposed by the more effective ways to ban access by minors.

Sullivan, 372 U.S. 58, 66 (1963). *See also NAACP v. Button*, 371 U.S. 415, 433 (1963) (First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society"). Consequently, this Court has condemned government regulation which has the "effect of *inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.*" *Smith v. California*, 361 U.S. 147, 151 (1959) (emphasis added).[15]

These principles are fully applicable to constitutionally protected speech in bookstores and other establishments where the First Amendment guarantees "free access of the public to [this] expression." *Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring). Indeed, 'the central concern of the First Amendment in this area is that there be a *free flow* from creator to audience of whatever message a film or a book might convey." *Id.* (emphasis added). This "free flow" is precisely what is impaired by Virginia's display statute, which imposes a substantial burden on adult access to a wide range of protected speech. The imposition of that burden plainly violates the First Amendment.

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[15] In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), for example, the Court unanimously rejected the Government's claim that it was imposing a mere inconvenience by detaining mail found to be "communist political propaganda" and notifying the addressee that they could receive the mail by requesting it in writing. Although this requirement did not deny "ultimate access," the Court found that it violated the First Amendment because the affirmative obligation imposed by the law was "almost certain to have a deterrent effect" on the exercise of First Amendment rights. As Justices Brennan, Goldberg and Harlan explained in their concurring opinion, "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." 381 U.S. at 309 (Brennan, J., concurring). *See also NAACP v. Alabama*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963); *American Communications Association v. Douds*, 339 U.S. 382, 402 (1950).

b. *By requiring bookstores and others covered by the law to determine prior to the point of sale which materials are subject to the statute, the display law substantially burdens First Amendment rights.*

Virginia's display statute is far more burdensome than laws prohibiting sales to minors for a second reason. Persons covered by sale to minor statutes can comply by deciding *at the point of sale* whether the particular materials being purchased by a minor are subject to the statute (and, if the statute permits, the seller can take that particular minor's age into account). In contrast, because Virginia's display statute makes it unlawful even to display material covered by the statute, persons must comply with the statute *prior to displaying* it. For this reason, Virginia's display statute imposes very substantial burdens on the First Amendment rights of bookstores and other covered persons, and on the First Amendment rights of minors.

As we have explained, it is impossible for bookstores to review their entire inventory—which may include tens of thousands of books—prior to display to decide which materials are "harmful to minors." As a result many will comply with the statute by simply treating *all* materials with sexually explicit content as subject to the statute's requirements. Even if bookstores try to minimize their burden by applying the law in this very broad manner, however, they must still review their entire inventory to decide which books and other materials contain some sexually explicit discussion or depictions. The result of this burden may be still broader censorship, including restrictions imposed on entire categories of expression to avoid undertaking the onerous task of reviewing each and every work sold in a store. In *Smith v. California*, 361 U.S. 147 (1959), the Court recognized the practical effect of laws that force booksellers to either review their entire inventory or sell material at their peril:

> The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.

361 U.S. at 153-154.

In the context of obscenity laws, the Court has found that First Amendment rights can be safeguarded by restricting those laws to persons who knew the "content and character" of the materials they distributed. This scienter requirement has important limitations: a defendant can be convicted without knowing that the materials are legally "obscene," *Hamling v. United States*, 418 U.S. 87, 123 (1974), and some courts have held that a defendant need not be aware of the contents of the specific materials at issue, F. Schauer, *The Law of Obscenity* 225 (1976); if the defendant's business has also distributed many other materials that are "hard core" or "arguably obscene" this may provide sufficient notice to satisfy the scienter requirement. *See, e.g., id.* at 225; *State v. Hull*, 86 Wash.2d 527, 546 P.2d 912, 921 (1976). Despite these limitations, in the obscenity context the scienter requirement provides significant protection to First Amendment rights because booksellers and others know that if they do not distribute a significant amount of "hard core" materials, they need not review all the materials in their inventory to be sure that none is obscene.

The State apparently assumes that the scienter requirement in its display statute affords the same protection because booksellers and others covered by the statute can only be convicted if they had "general knowledge" or "reason to know" the "content and character" of mate-

rials displayed in violation of the statute. Va. Code § 18.2-390(7). This assumption ignores the fundamental difference between obscenity laws and display laws regulating material that is "harmful to minors." In contrast to obscenity laws, booksellers cannot protect themselves from the reach of display laws by avoiding display of "hard core" materials. Instead, as the lower court found, as much as 25% of the average bookstore's inventory falls within the statute's definition of "harmful to minors"—a fact that, under the scienter doctrine developed in the obscenity context, puts booksellers on notice of the "content and character" of material in their stores. Accordingly, despite the inclusion of a scienter requirement in Virginia's display statute, booksellers run a substantial risk of prosecution and conviction unless they constantly review their stores' entire, changing inventory *prior to display* to insure that materials "harmful to minors" are not displayed.

This advance determination not only severely burdens the constitutionally protected activities of persons covered by the statute, it also substantially restricts the access of minors to speech that is constitutionally protected, even as to them. In contrast to the particularized decisions permitted by sale to minor statutes, Virginia's display law will force many persons covered by the statute to either prevent minors from having access to *any* material that includes sexually oriented content, or to prevent all minors from having access to material that might be harmful to minors of any age. Thus, although the State is only interested in denying minors access to a "miniscule amount" of material, the statute's effect will be to burden substantially the First Amendment rights of minors.[16]

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[16] *See Erznoznik*, 422 U.S. at 212-13 ("minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.").

III. LAWS RESTRICTING THE DISPLAY OF MATERIALS DEEMED "HARMFUL TO MINORS" THREATEN THE EXERCISE OF FIRST AMENDMENT RIGHTS IN THE NATION'S LIBRARIES.

The burdens imposed by Virginia's display statute, and similar statutes enacted in other states, are matters of grave concern to the nation's libraries and librarians. On its face, the Virginia statute prohibits only displays for "commercial purposes," and thus does not *directly* regulate display of reading materials in libraries. For several reasons, however, the constitutionality of Virginia's display law is a matter of the utmost concern to librarians.

In contrast to Virginia's law, display laws passed by some other states are not limited to displays for commercial purposes. *E.g.*, Ariz. Rev. Stat. Ann. § 13-3507. If the Court holds that Virginia can constitutionally impose criminal penalties on commercial establishments for displaying materials deemed harmful to minors, then states almost certainly may impose the same burdens on public libraries. Indeed, a number of courts have struck down statutory exemptions that protect libraries from the burdens of display laws, holding that such exemptions violate the Equal Protection Clause. *E.g.*, *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 785-86 (Colo. 1985) (en banc).

Even in states where libraries are exempted from display statutes, and these exemptions are upheld by the judiciary, display laws will necessarily have an inhibiting effect on libraries. History has taught librarians that when speech activities are not tolerated in private settings, attempts to engage in those same activities in public libraries are likely to generate outrage by vocal segments of the public, resulting in censorship. As noncommercial enterprises that depend on the support of the public, libraries do not have the incentive, the resources, or the inclination to fight prolonged battles against such public pressure, and many will instead modify their be-

havior to conform with the standards imposed on private enterprises.

Librarians are also well aware that, just as they cannot afford to ignore display statutes, the burdens of compliance with display statutes pose extraordinary difficulties. The books and other reading materials in libraries, like those in bookstores, include a vast amount of material with some sexually explicit content. This should be neither surprising nor disturbing, for as this Court recognized in *Roth v. United States*, 356 U.S. 476, 487 (1976), "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing human interest throughout the ages; it is one of the vital problems of human interest and public concern." Requiring libraries to devote a substantial portion of their limited resources to reviewing their entire collections to determine which materials are sexually explicit, and then to determine which sexually explicit materials are and are not suitable for minors, would be completely antithetical to the purpose of libraries, and would be administratively impossible. For most libraries, operating under severe budgetary constraints, the resources required to even try to comply with such laws would leave little or no funds available to purchase or maintain collections.

Implicit in Virginia's limitation of its display statute to commercial institutions is a recogition that the display statute imposes extraordinary burdens, burdens that cannot be reconciled with the freedoms that libraries are intended to safeguard, embody and foster. This Court should emphatically reject the State's contention that the Constitution permits such burdens to be imposed on constitutionally protected speech activities. Whether imposed on libraries or other enterprises engaged in protected speech activity, the imposition of those burdens violates the First Amendment.

CONCLUSION

For the foregoing reasons, the lower courts correctly determined that Virginia's display law substantially and impermissibly burdens the First Amendment rights of adults, minors, and persons and enterprises subject to the statute. The State's attempt to trivialize these burdens by suggesting that the statute will be voluntarily restricted to serving the very narrow interest claimed by the State amounts to nothing more than an assertion that persons covered by the statute can disregard the law's literal requirements and hope that law enforcement officials will look the other way. This belief that the possibility of enlightened law enforcement adequately protects the right of free speech fundamentally misconceives this Court's First Amendment jurisprudence, which has long recognized that First Amendment freedoms are as fragile as they are precious. *See, e.g., Roth v. United States*, 354 U.S. 476, 488 (1957). First Amendment freedoms cannot be made subject to essentially unreviewable administrative discretion, however well-intentioned. *E.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). The Virginia display statute, both by its terms and by its foreseeable effects, substantially burdens constitutionally protected rights and violates the First Amendment.

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July 3, 1987

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA,

Appellant,

—v.—

AMERICAN BOOKSELLERS ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF JEAN M. AUEL, JUDY BLUME, JACKIE COLLINS, JOHN IRVING, ERICA JONG, NORMA KLEIN, JAMES A. MICHENER, SIDNEY SHELDON, JOHN UPDIKE, IRVING WALLACE, THE AUTHORS LEAGUE OF AMERICA, INC., AND THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES.

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Preliminary Statement

Ten individual authors and two professional organizations together representing thousands of additional authors submit this brief, *amici curiae*, pursuant to Rule 36 of the Rules of this Court, urging affirmance of the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The court of appeals struck down as unconstitutional the Virginia statute here in issue on the grounds, *inter alia*, that the statute "discourages the exercise of first amendment rights in a real and substantial fashion. . . ." (J. S. App. A 11). The written consents of the parties to the filing of this brief have been obtained and are being filed with the clerk of this Court.

The Amici

Jean M. Auel is a novelist and poet whose highly acclaimed works include *The Clan of the Cave Bear* (1980), *The Valley of Horses: Earth's Children* (1982), and *The Mammoth Hunters* (1985).

Judy Blume is the author of *Wifey* (1978) and *Smart Women* (1984), as well as two novels aimed for young adults, *Forever* (1975) and *Tiger Eyes* (1981). Additionally, she has written fifteen books for children. Ms. Blume is a board member of the Society of Children's Book Writers and the 1984 recipient of the Carl Sandburg Freedom to Read Award from the Chicago Public Library.

Jackie Collins is the author of numerous popular novels including *Hollywood Wives* (1983) and *Hollywood Husbands* (1986), *Chances* (1982), and *Sinners* (1984). Two of her novels, *The World Is Full of Married Men* (1968) and *The Stud* (1969), have been released as feature films.

John Irving is the author of six novels, including the popular works *The World According to Garp* (1978) and *The Hotel New Hampshire* (1981). Mr. Irving was a Rockefeller Foundation grantee in 1971-72, and a National Endowment for the Arts fellow in 1974-75.

Erica Jong is a poet and fiction writer, whose novel *Fear of Flying* (1974) was a bestseller and Book-of-the-Month Club alternate. Her more recent publications include *Serenissima* (1987) and *Parachutes & Kisses* (1985). Ms. Jong has received the American Academy of Poets Award, the Borestone Mountain Award in poetry, the Bess Hokin prize from *Poetry Magazine* and the Alice Faye di Castagnolia Award of the Poetry Society of America.

Norma Klein is the author of novels, short stories, and fiction for children and teenagers. Her works include *Girls Turn Wives* (1976) (Literary Guild Book Club alternate selection), *Give Me One Good Reason* (1973) (Book-of-the-Month Club alternate), *Family Secrets* (1985) (teenage fiction) and *Mom, the Wolf Man and Me* (1972) (teenage fiction). In 1983, she was awarded the O. Henry Award for her short story "The Wrong Man."

James A. Michener is a renowned author whose novels include *Tales of the South Pacific* (1947), for which he won the Pulitzer Prize, *The Bridges at Toko Ri* (1953), *Caravans* (1963), *The Source* (1965), *The Drifters* (1971), *Centennial* (1974), *Chesapeake* (1978), *The Covenant* (1980), *Space* (1982), *Poland* (1983) and *Texas* (1985). In May, 1984, Mr. Michener was recognized by President Ronald Reagan for his long-standing and continuing support of the arts in America.

Sidney Sheldon has authored the following popular novels: *The Other Side of Midnight* (1974), *A Stranger in the Mirror* (1976), *Bloodline* (1977), *Rage of Angels* (1980), *Master of the Game* (1982) and *If Tomorrow Comes* (1985). He received the Academy Award in 1948 for his screenplay, "The Bachelor and the Bobby-Soxer," and the Tony Award in 1956 for his book for the Broadway play "Redhead."

John Updike is the distinguished author of many novels and short stories including *Rabbit Run* (1960), *Pigeon Feathers* (1962) (short story collection), *The Centaur* (1963), for which he received the National Book Award, *Rabbit Redux* (1971), *The Coup* (1978), *Rabbit is Rich* (1981), for which he received the Pulitzer prize, and *The Witches of Eastwick* (1984). He is a

frequent contributor to *The New Yorker*, where he was a staff member from 1955 to 1957.

Irving Wallace is a widely read author of fiction and non-fiction, whose many books include *The Prize* (1962) (Book-of-the-Month Club special selection), *The Word* (1972) (Book-of-the-Month Club selection), *The R Document* (1976) (*Reader's Digest* Book Club selection), *The Pigeon Project* (1979) (Literary Guild selection), *The Book of Lists* (1977), *The Miracle* (1984), and *The Seventh Secret* (1986). For his novel *The Man* (1964), Wallace received the George Washington Carver Memorial Institute Award and the Commonwealth Club of California silver medal. Mr. Wallace's novel *The Seven Minutes* (1969), whose thematic focus was censorship, won the Paperback of the Year Award from the National Bestsellers Institute. Over 194 million copies of Mr. Wallace's books have been sold to date.

The Authors League of America, Inc. is the major national society of professional authors, representing more than 14,500 authors, dramatists, and journalists. One of the League's principal purposes is to express its members' views in cases involving fundamental questions of freedom of expression and to support that fundamental constitutional right.

The American Society of Journalists and Authors, formed in 1948, is a nationwide organization of over 700 members who qualify as professional independent non-fiction writers. Its members write magazine articles, trade books, and other works of non-fiction, including works in the field of health and human sexuality.

Interest of The Amici

Freedom to speak and write is an abstraction to most, but for the writer it is a necessity of his daily craft. It is an open space to traverse in setting down one's thoughts, the freedom to roam where imagination, learning, and conviction carry. Censorship, however motivated, is an intruder which hems in the writer, setting up barriers which both confine and distort the expression of the writer's vision.

As authors and representatives of authors of a wide range of fiction and non-fiction, *amici* submit this brief to warn that the Virginia statute at issue in this case threatens to have such a confining effect. Although directed at protecting persons under 18 years of age from undue exposure to sexually-explicit materials, the statute, in practical application, would have far broader consequence. As the trial record in this case makes clear, for a retailer to effectuate the law's requirements would entail removing from public display—and hence from perusal by persons over 18 years of age—any works the sexual content of which might be objectionable to the youngest child. Virginia's effort at remedy is surely overbroad, especially in the face of existing state law—not here challenged—prohibiting the sale to minors of materials obscene as to them. Va. Code § 18.2-390 and 391 (1970). Further to regulate displays of a wide range of materials of value to adults and even to older teenagers so as to protect the sensibilities of the youngest minors is, as this Court has observed, "to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

The Virginia statute is of more than theoretical concern to *amici*. The individual *amici*, representative of many of their fellow authors, write for audiences ranging from adult readers to children growing into adulthood. Many of *amici's* works deal candidly with sexual themes, reflecting the reality that sexuality is a central aspect of human existence. To be sure, those of *amici's* works which deal with such themes and which are directed to younger-than-adult audiences reflect an appropriate sensitivity to the needs and level of emotional preparedness of the targeted reader. But the Virginia statute fails to accommodate these literary objectives. To the contrary, the statute threatens the vitality of the range of these works by its indiscriminate ban on displays of any work which is "harmful to minors" of any age—no mind the importance of the work for adults or older juveniles.

Amici appreciate fully that a community may find that the treatment of sex in particular works makes those works unsuitable for young children. But if communities are able to cut authors off from the more mature audiences to which their

works are directed by conditioning the public availability of their works upon their suitability for the youngest reader, *amici* will be pressured to limit or eliminate altogether the treatment of sex in order to allow their books to be freely disseminated.

History does not allow *amici* to be complacent about the likelihood of application of statutes like Virginia's to mainstream works of literature. Experience teaches of the willingness of local majorities—in the name of protecting children—to condemn works widely regarded as fine literature. Virginia's juvenile display law, directed at commercial displays of works unsuitable for the youngest child, is on its face indifferent to the overall literary value of a particular work. Booksellers and other retailers are left, under the statutory scheme, to the whim of the local prosecutor, and the community sentiment which his enforcement initiatives invariably will reflect. Such an environment is deeply inhibiting to literary creativity and is contrary to firmly-rooted First Amendment principles.

This Court long ago ruled that a state's interest in protecting children from sexually explicit materials does not warrant "reduc[ing] the adult reading population . . . to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383-84 (1957). If the authors here represented are to practice their craft, to write openly, provocatively and educationally about the topic of sex, a matter of "absorbing interest to mankind" (*Roth* v. *United States*, 354 U.S. 476, 487 (1957)), and to reach their intended adult and older teenage audiences, then Virginia's statutory deterrent to such expression and dissemination must be stricken down under the First Amendment.

Argument

THE VIRGINIA STATUTE VIOLATES THE FIRST AMENDMENT BY IMPERMISSIBLY RESTRICTING ADULTS' ACCESS TO CONSTITUTIONALLY-PROTECTED MATERIALS

Virginia's juvenile display statute makes unlawful the display for commercial purposes of books, magazines and other printed matter deemed "harmful to minors," in a manner "whereby juveniles may examine and peruse" them. Va. Code § 18.2-391(a). A "juvenile" is defined under the statute as anyone under 18 years of age. Va. Code § 18.2-390(1).

The trial record makes clear that the potential sweep of the law is immense. Works of many, if not all, of the individual *amici* and of scores of the organizational *amici's* members arguably would fall prey to the statute. (See J.S. App. A 20).[1] Not that such works are "pornographic" or otherwise of marginal literary, artistic or educational value. Rather, frank portrayals of sexual themes, while integral to much of fiction and non-fiction for adults, may well be unsuitable for very young children not yet emotionally equipped to deal with such matters. The statute indiscriminately bars display of works which may be "harmful" to such young children—without regard to the value these works unquestionably have for older readers.

The record further reveals that the options presented to the bookstore or other retail establishment so as not to risk criminal prosecution under the law for displaying works potentially "harmful" to 5, 10 or 12 year olds are all severely damaging to the First Amendment interests at stake. One option is to stop displaying and selling altogether the potentially offending works. It is readily apparent that the exercise of this option would severely constrain the creation of works

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1 Illustratively, the Attorney General of Virginia argued before the Fourth Circuit that one of the best-selling works of *amicus* Jackie Collins, *Hollywood Wives*, would be covered under the statute. (C.A. Va. Br. 27-28).

dealing with sexuality as a central aspect of human existence. The discouragement of writings about sex would be tragic indeed.

Depictions of sex in the individual *amici's* works are not gratuitous. As the sexual feelings and attitudes of an individual are an integral aspect of his identity, so the depiction of those feelings breathe life and definition into the characters *amici* and other authors create. As Henry Miller wrote, sexual passages in literature "represent my endeavor . . . to portray the *whole* man. . . . man in all the heights and depths of his being."[2] To force authors to deemphasize, or eliminate altogether, portrayals of sexual feelings and relations would distort the expression of the author's vision and deprive literature of its needed free rein to communicate about the human experience at every level.

As to non-fiction writing, the statute would threaten the flow of accurate, well-researched information regarding health and human sexuality to the public. Books and magazines play a critical role in educating individuals on these private matters.

The alternative presented to the retailer of limiting open display of potentially "harmful" works—through "adults-only" sections, under-the-counter storage, and the like—was demonstrated by the trial record to be no less dangerous to preserving First Amendment principles. For, as the court of appeals noted, such measures—even to the extent economically practicable—"unreasonably interfere[ ] with the booksellers' right to sell the restricted materials and the adults' ability to buy them." (J.S. App. A 10).

The open display of books and other reading materials is essential to their widespread public distribution. The buying public is a browsing and perusing public. If sales of reading materials were dependent upon readers requesting specific titles from the "back room," fewer works would be read, to the detriment of authors, publishers, and the reading public.

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2 Henry Miller, "First Letter to Trygve Hirsch (1957)," in *Henry Miller on Writing* 207 (Thomas H. Moore ed. 1964).

In so fundamentally inhibiting adult access to constitutionally-protected materials, the Virginia statute, whatever its intent, runs afoul of the First Amendment. For, as this Court has observed, even a legitimate state interest in protecting children from sexually explicit materials "does not justify a total suppression of such materials, the effect of which would be to 'reduce the adult population . . . to reading only what is fit for children.' " *Jacobellis* v. *Ohio*, 378 U.S. 184, 195 (1964), *quoting Butler* v. *Michigan*, *supra*. This basic principle has been affirmed in other decisions of this Court, most recently in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 73-74 (1983). *See also Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58, 71 (1963).

If literature is to fulfill its full role in society—to elucidate our shared sentiments, heighten our appreciation of reality, expand our sense of the possible—the adult reader must have ready access to all works of potential interest. The Virginia statute impedes that access, effectively supplanting what our Constitution entrusts to the author with a heavy-handed censorship regime.

Conclusion

Amici are proud of the literary tradition they help sustain and nurture. They can thrive only in a climate where their ideas are freely available to those who wish to entertain them. Virginia's juvenile display law, if upheld, will inhibit the free flow of ideas between such authors and the audiences entitled to receive them. This result would be a costly one to our First Amendment freedoms. Accordingly, the judgment of the court of appeals striking down the law as violative of the First Amendment should be affirmed.

Respectfully submitted,

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MOTION FILED
NOV 10 1987

No. 86-1034

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF VIRGINIA, APPELLANT

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL., APPELLEES

On Appeal from the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES

Pursuant to Rule 35.6 of the Rules of this Court, appellees seek leave to file the attached supplemental memorandum addressing the propriety of certifying questions concerning the scope of the Virginia juvenile display statute (Va. Code § 18.2-391(a)) to the Supreme Court of Virginia. The issue of certification was not discussed in the briefs of the parties and was raised for the first time at oral argument. As a result, the Court has not received a focused presentation on the question whether certification would be appropriate in this case. Appellees believe that the considerations mentioned in this short supplemental memorandum would be relevant to the Court's decision.

It is therefore respectfully submitted that the motion for leave to file the attached supplemental memorandum should be granted.

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SUPPLEMENTAL MEMORANDUM FOR THE APPELLEES

In this case, the district court and the court of appeals construed the Virginia juvenile display statute (Va. Code § 18.2-391(a)) to apply to a broad range of constitutionally-protected materials available in general bookstores within the State (J.S. App. A8-A10 & n.9). Based on that determination, both lower courts held the statute unconstitutional.

When the case was pending in the district court, Virginia requested that the court abstain "so that state courts may be given the opportunity to construe the 1985 amendment and determine its constitutionality" (J.S. App. A24). The district court declined to do so on the ground that "state court resolution of this matter would

not render unnecessary, nor substantially modify the federal constitutional questions" (*ibid.*). Virginia did not challenge that abstention ruling on appeal, nor did it request, in either its petition for a writ of certiorari or its brief on the merits, that this Court defer its resolution of the First Amendment question until the state courts had an opportunity to interpret the statute.

Nonetheless, the suggestion was raised at oral argument that the Court may wish to resort to the Virginia certification procedure, whereby the Virginia "Supreme Court may in its discretion answer questions of [state] law certified to it by" any federal court. Va. S. Ct. R. 5:42 (a) (1987). We believe that certification would not be appropriate.

First, there is a serious question whether the Virginia Supreme Court would accept a certification in this case. The state certification rule applies only where "a question of Virginia law *is determinative* in any proceeding pending before the certifying court" (Rule 5:42(a) (emphasis added)), and even then the Virginia Supreme Court has complete "discretion * * * whether to answer any certified question of law." Rule 5:42(e). Here, even if the Virginia Supreme Court could somehow adopt a plausible narrowing interpretation of the broad language of the 1985 amendment, it is most unlikely that that ruling would be "determinative" of appellees' First Amendment claims, because the state statute would still prohibit some quantity and category of constitutionally protected materials from being displayed on a bookstore's open shelves. Thus, this may not be the sort of situation to which the Virginia certification procedure was meant to apply.*

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* See Wright, Miller & Cooper, *Federal Courts and Procedure* § 4248 at p. 528 (1978):

> In a state that will answer questions only if any answer will dispose of the case, federal courts will have to refrain from

In any event, it is doubtful whether the Virginia Supreme Court could provide this Court with a meaningful narrowing interpretation of the juvenile display provision. Given the plain language of the statute and the breadth of many of its key terms, there is simply no way that the state court could construe a particular word or a particular phrase to eliminate the constitutional problem. To be sure, the Virginia Supreme Court could perhaps answer specific questions whether *Portnoy's Complaint*, or *Hollywood Wives*, or a host of other disputed books fall within the prohibitions of the 1985 amendment, but those *ad hoc* determinations would provide no intelligible standard by which booksellers could judge (on pain of criminal penalties) whether thousands of other volumes may be displayed on their shelves.

If there were any doubt on this score, it is dispelled by the recent experience in the identical context of the Georgia juvenile display statute, OCGA § 16-12-103(e). The district court preliminarily enjoined enforcement of the statute and then abstained (*American Booksellers Ass'n, Inc.* v. *Webb*, 590 F. Supp. 677 (N.D. Ga. 1984)), and both sides appealed to the Eleventh Circuit. The court of appeals then invoked the Georgia certification provisions and certified the following question to the Georgia Supreme Court: "How does the Georgia Supreme Court construe the provisions * * * which have been challenged in this suit?" *American Booksellers Ass'n, Inc.* v. *Webb*, 744 F.2d 784, 786 (11th Cir. 1984). The Georgia Supreme Court declined the certification, noting that the statute might be applied in a variety of situations and that it would be "inappropriate for this court to establish the parameters within which the Act may or may not

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certifying questions that are not of this sort. This would bar all use of certification in Pullman-type cases, where by hypothesis a federal constitutional question will have to be decided by the federal court if the statute is not interpreted in a way that avoids the constitutional question.

be operative." *American Booksellers Ass'n, Inc.* v. *Webb*, 329 S.E.2d 495, 498 (Ga. 1985). Here, too, resort to the state certification procedure would result only in confusion and delay.

In sum, because the State has never asked this Court for abstention or certification, because it is questionable whether the Virginia certification procedure even applies to this case, and because the State has not put forward a textually plausible construction of the juvenile display provision that would eliminate its patent constitutional defects, there would be no purpose served by certifying the question of statutory construction to the Virginia Supreme Court.

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NOVEMBER 1987

Supreme Court, U.S.
FILED
NOV 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1034

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APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM

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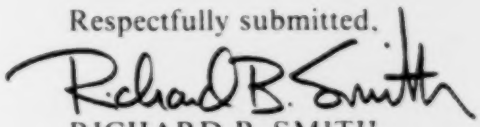
APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

Pursuant to Rule 35.6 of the Rules of this Court, the Commonwealth of Virginia, the Appellant herein, seeks leave to file the attached supplemental memorandum addressing the propriety of certifying questions concerning the scope of Virginia's "manner of display" statutes (Va. Code §§ 18.2-390 and 391) to the Supreme Court of Virginia pursuant to that court's Rule 5:42. The issue of certification was not discussed in the briefs of the parties, but was raised by the Court at oral argument. The Appellees have filed a supplemental memorandum arguing that the certification procedure should not be used by the Court. Virginia believes that the considerations stated in her short supplemental memorandum would be relevant to the Court's decision.

It is therefore respectfully submitted that this motion for leave to file the attached supplemental memorandum should be granted.

Respectfully submitted,



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November 1987

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Virginia Rule 5:42. Certification Procedures.

(a) *Power to Answer.* — The Supreme Court [of Virginia] in its discretion may answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia.

(b) *Method of Invoking.* — This Rule may be invoked only by an order of one of the courts referred to in section (a). No party litigant in the foregoing courts may file in the Supreme Court a petition or motion for certification.

(c) *Contents of Certification Order.* — A certification order shall set forth:

(1) the nature of the controversy in which the question arises;

(2) the question of law to be answered;

(3) a statement of all facts relevant to the question certified;

(4) the names of each of the parties involved;

(5) the names, addresses, and telephone numbers of counsel for each of the parties involved;

(6) a brief statement explaining how the certified question of law is determinative of the proceeding in the certifying court; and

(7) a brief statement setting forth relevant decisions, if any, of the Supreme Court and the Court of Appeals of Virginia and the reasons why such decisions are not controlling.

(d) *Preparation of Certification Order.* — The certification order shall be prepared by the certifying court, signed by the presiding justice or judge, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the certified question. The Supreme Court may in its discretion restate any question of law certified or may request from the

certifying court additional clarification with respect to any question certified or with respect to any facts.

(e) *Notification of Acceptance or Rejection.* — The Supreme Court, in its discretion, may decide whether to answer any certified question of law. The Supreme Court will notify the certifying court and counsel for the parties of its decision to accept or reject any certified question of law. A notice accepting a question will include a briefing schedule and, if oral argument is permitted by the Supreme Court, a tentative date and the length of time allowed for such argument.

(f) *Revocation of Acceptance.* — The Supreme Court, in its discretion, may revoke its decision to answer a certified question of law at any time. Upon deciding to revoke, the Supreme Court will notify the certifying court and counsel for the parties of its action.

(g) *Costs of Certification.* — Fees and costs shall be the same as in civil appeals docketed in the Supreme Court and shall be paid as ordered by the certifying court in its order of certification.

(h) *Briefs.* — The form, length, and time for submission of briefs shall comply with Rules 5:26 through 5:34 *mutatis mutandis.*

(i) *Opinion.* — A written opinion of the Supreme Court stating the law governing each question certified will be rendered as soon as practicable after the submission of briefs and after any oral argument. The opinion will be sent by the clerk under the seal of the Supreme Court to the certifying court and to counsel for the parties and shall be published in the Virginia Reports.

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1034

COMMONWEALTH OF VIRGINIA,
APPELLANT,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.,
APPELLEES.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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APPELLANT'S SUPPLEMENTAL MEMORANDUM

The Court inquired *sua sponte* during oral argument as to the feasibility of certifying questions to the Supreme Court of Virginia concerning the meaning of certain provisions of Virginia Code §§ 18.2-390 and 391. Although the Appellees did not object when the question arose, they now strenuously, and rather desperately it seems, do so.

The Appellees first complain that Virginia did not ask either the district court or the court of appeals to certify questions to the Virginia Supreme Court. They well know, however, that no such procedure was available in Virginia when this case was pending in the courts below, the applicable Rule 5:42 of the Supreme Court of Virginia not having become effective until April 1, 1987. And, although the Appellees seem to hint that the State is somehow guilty of "sandbagging" in this matter, they do not suggest how we

were supposed to ask the courts below to use a certification procedure that did not yet exist.[1]

The Appellees further contend that "this [case] may not be the sort of situation to which the Virginia certification procedure was meant to apply" because the Virginia Supreme Court's answers to any certified questions supposedly would not ultimately determine the outcome of the case. The courts below, however, based their invalidation of Virginia's "manner of display" amendment on the alleged breadth of its terms, giving them the broadest possible interpretation. A narrow construction of the provision's meaning by the Virginia Supreme Court would thus vitiate the basis of the lower courts' judgments and *a fortiori* determine this case in Virginia's favor.

Virginia therefore believes that it would not be inappropriate for this Court to certify questions concerning the Amendment's provisions to the Supreme Court of Virginia and for that court to answer them under its Rule 5:42, and the Appellees cite no *Virginia* authority to the contrary. We also believe, however, that, while certification would not be inappropriate, the Court need not resort to it in order to resolve this litigation.

This case involves a *facial* attack on a Virginia statute. For more than two years Virginia has consistently asserted narrowing constructions of the Amendment's terms that are not just plausible, but which are required by Virginia law. *See Commonwealth v. Ellett*, 174 Va. 403, 4 S.E.2d 762 (1939) (Virginia law requires that criminal laws be strictly construed *against the State*). Given the availability of these profferred narrowing constructions, this Court's jurisprudence makes clear that Virginia's "manner of display" amendment must survive the Appellee's *facial* attack: "Facial overbreadth has not been invoked when a limiting construction. . . *could* be placed on the challenged staute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (emphasis added); *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (a state statute should not be deemed

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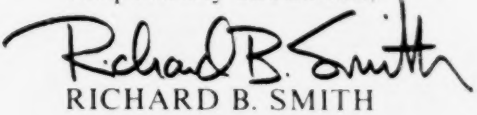
[1] The Appellee's also state that Virginia did not raise an abstention argument in this Court, but they contended in their own brief that we did in fact do so and responded to our argument at length. (Appellee's Br. 22-25).

facially invalid unless it is not subject to narrowing construction by state courts); *New York v. Ferber*, 458 U.S. 747, 773 (1982) (this Court will not assume that state courts will widen the possibly invalid reach of a statute by giving it expansive constructions.)[2]

In conclusion, if this Court deems it necessary to certify questions to the Virginia Supreme Court as to the meaning of Virginia's 1985 "manner of display" amendment, Virginia believes and will argue that the Supreme Court of Virginia should answer such questions under its Rule 5:42. Virginia also believes, however, that, because this case involves a *facial* attack, this Court has before it sufficient narrowing constructions to validate the Amendment now, without resorting to the certification procedure.

Respectfully submitted,



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[2] The courts below ignored the rule that federal courts must accord a state law an interpretation supporting its constitutionality, *Screws v. United States*, 325 U.S. 91, 98 (1943) (plurality opinion), and simply *assumed* the broadest possible meanings of the Amendment's terms without ever analyzing them under Virginia law; in fact, the court of appeals relied on a wholly different and much broader *Georgia* statute to determine the supposed scope of the *Virginia* provision under attack. (J.S. App. A-9). This Court will not defer to lower federal courts on state-law issues under such circumstances. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 91, 500 n.9 (1985).

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the *Reporter of Decisions* for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

VIRGINIA *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86–1034. Argued November 4, 1987—Decided January 25, 1988

A 1985 amendment to a Virginia statute makes it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" certain visual or written sexual or sadomasochistic material that is harmful to juveniles. What is "harmful to juveniles" is defined elsewhere in the statute. Plaintiffs, a number of booksellers' organizations and two Virginia non-"adults only," general-purpose bookstores (appellees here), filed suit in Federal District Court under 42 U. S. C. § 1983, alleging that the amendment is facially violative of the First Amendment in that it significantly and unnecessarily burdens the expressive rights of adults because of the economically devastating and extremely restrictive measures booksellers must adopt to comply; is overbroad in that it restricts access by mature juveniles to works that are "harmful" only to younger children; and is unconstitutionally vague because it is impossible to determine what standard should be used in deciding whether a work is appropriate for juveniles of different ages and levels of maturity. At the trial, the owners of the bookstores introduced as exhibits 16 general-subject books they believed to be covered by the amendment, and testified that the law might apply to as much as one-half of their inventory. However, on cross-examination, they admitted their unfamiliarity with the portion of the law defining "harmful to juveniles." Nevertheless, upon finding, *inter alia*, that the amendment would cover between 5 and 25 percent of a typical bookseller's inventory, the court held the amendment unconstitutional and permanently enjoined its enforcement. The Court of Appeals affirmed. Although critical of the evidentiary basis for the determination, the court neither accepted nor rejected the District Court's finding as to the statute's scope. However, the court did declare that booksellers would

face "significant" difficulty in attempting to comply. In so ruling, the court rejected the State's suggestion that a bookseller could avoid prosecution by merely tagging offensive materials or placing them behind "blinder" racks. The court also questioned whether treating all juveniles identically was constitutional, but did not determine the issue.

Held:

1. Plaintiffs had standing to bring suit. The "injury in fact" standing requirement is met here, since the amendment is aimed directly at plaintiffs, who, if their interpretation is correct, will have to take significant and costly compliance measures or risk criminal prosecution. The usual rule that a party may assert only a violation of its own rights must give way to the exception allowing the assertion of the free expression rights of others, since plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers. The pre-enforcement nature of the suit is irrelevant, since plaintiffs have alleged an actual and well-founded fear that the statute will be enforced against them, and there is no reason to assume otherwise. Indeed, the statute's alleged danger is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution. Pp. 7–8.

2. In light of the case's unique factual and procedural setting, this Court will not attempt to decide the constitutional issues presented, but instead certifies two questions of statutory interpretation to the Virginia Supreme Court, answers to which will substantially aid this Court's review and may determine the case entirely. Pp. 8–14.

(a) Under the unusual circumstances of the case, where the amendment's constitutionality turns upon the way in which it is read, but where none of the conflicting interpretations are reliable, and where the Attorney General apparently is willing to concede the case if the statute is not narrowly interpreted, it is essential that this Court have the benefit of the Virginia Supreme Court's authoritative answer to the certified question whether any of the books introduced by plaintiffs as exhibits below fall within the statute's scope, and what general standard should be used to determine the statute's reach in light of juvenile's differing ages and levels of maturity. The State Attorney General's interpretation that the statute covers only a very few "borderline" obscene works and none of plaintiffs' exhibits cannot be accepted as authoritative, since the Attorney General does not bind the state courts or local law enforcement authorities. Moreover, the District Court's holding that the law applies to up to a quarter of a typical bookstore's inventory is not supported by reliable evidence, since the bookstore owners who testified were unfamiliar with the statutory definition of "harmful to minors." Nor can the Court of Appeals' construction that the amendment would confront booksellers with a "substantial" compliance problem be relied

Syllabus

upon, since, although it criticized the basis of the District Court's holding, the Court of Appeals gave no alternative basis for its own determination. Pp. 9–11.

(b) The question whether, as asserted by the State at oral argument, the amendment is satisfied if a bookseller, as a matter of policy, prevents a juvenile observed reviewing covered works from continuing to do so, even if the restricted materials are not segregated from nonobjectionable works, and, if not, whether the statute would be complied with if the store's policy were announced or otherwise manifested to the public, is also certified, since an affirmative answer to the first alternative would mean, while a positive response to the second alternative might mean, that the burden to the bookseller, and therefore to the adult bookbuying public, is significantly less than that feared and asserted by plaintiffs. There is some advantage and no cost, either in terms of the First Amendment chilling effect or unnecessary delay, in certifying this question, which proffers a narrowing construction that is neither inevitable nor impossible, in light of the unusual circumstances of this case; *i.e.*, that another question is already being certified, that enforcement of the statute will remain enjoined throughout the certification process, and that no state court has ever had the opportunity to interpret the pertinent statutory language. Pp. 11–13.

802 F. 2d 691, questions certified.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 86–1034

VIRGINIA, APPELLANT *v.* AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[January 25, 1988]

JUSTICE BRENNAN delivered the opinion of the Court.

The courts below declared unconstitutional the following Virginia statute: "It shall be unlawful for any person . . . to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" visual or written material that "depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles." Va. Code § 18.2–391(a) (Supp. 1987). The unique factual and procedural setting of this case leads us to conclude that an authoritative construction of the Virginia statute by the Virginia Supreme Court would substantially aid our review of this constitutional holding, and might well determine the case entirely. Accordingly, we certify two questions to the Virginia Supreme Court.[1]

[1] Rule 5:42(a) of the Rules of Virginia Supreme Court states:

"*Power to Answer.*—The [Virginia] Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia."

This opinion, along with a statement to be appended by the Clerk of the Court setting out the names, addresses, and telephone numbers of counsel

I

In 1968, this Court held consitutional a state prohibition on the sale to those under 17 of materials deemed "harmful to juveniles." *Ginsberg* v. *New York*, 390 U. S. 629, 643 (1968). The next year, Virginia enacted a similar statute. The Virginia Code's current definition of "harmful to juveniles" is a modification of the *Miller* definition of obscenity, adapted for juveniles. *Miller* v. *California*, 413 U. S. 15, 24 (1973). The statute reads, in relevant part,

> "'Harmful to Juveniles' means that quality of any description or presentation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles." Va. Code § 18.2–390(6) (1982).

In 1985, Virginia amended its law to make it also a crime "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" the aforementioned materials, even if these materials are not actually sold to any juvenile.[2]

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for the parties and the names of each of the parties involved, shall constitute the certification order. Va. Sup. Ct., Rule 5:42(d). The Clerk of the Court shall also transmit to the Virginia Supreme Court the record in this case, including plaintiffs' exhibits and the trial transcript. Appellant shall bear the fees and costs on certification in the Supreme Court of Virginia. Va. Sup. Ct. Rule 5:42(g). Such fees and costs shall be taxable items pursuant to Rule 50 of the Rules of this Court. Virginia's certification procedure became effective on April 1, 1987, and hence was unavailable to the courts below.

[2] The law, with the 1985 amendment italicized, reads as follows:

"Definitions.—As used in this article:

"(1) 'Juvenile' means a person less than eighteen years of age.

Plaintiffs made a facial challenge to the 1985 amendment in the United States District Court for the Eastern District of Virginia.[3] They asserted that the 1985 amendment was fun-

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[Subsections (2)-(5) define "Nudity," "Sexual conduct," "Sexual excitement," and "Sadomasochistic abuse," respectively.]

"(6) 'Harmful to Juveniles' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

"(7) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile." Va. Code § 18.2–390 (1982).

Va. Code § 18.2–391 (Supp. 1987) reads:

"Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse*:

"(1) Any picture, photography, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

"(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

. . . . . .

"(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor."

[3] Plaintiffs below included a number of organizations with memberships consisting of national and Virginia booksellers, two Virginia bookstores, and a Virginia adult and her juvenile child. The District Court dismissed the parent and child for failure to allege potential prosecution under the 1985 amendment, a potential economic injury flowing therefrom, or "any-

damentally different than the prior statute in that it burdens the First Amendment rights of adults, as to whom at least some of the covered works are not obscene. They argued that, while the *sale* provision does not affect adult access to covered works in any significant way, as the Court held in *Ginsberg*, *supra*, at 634–635, the 1985 amendment, governing the *display* of such works to minors, substantially restricts access to adults because of the economically devastating and extremely restrictive measures booksellers must adopt to comply. Specifically, they argued, compliance requires a bookseller to: (1) create an "adults only" section of the store; (2) place the covered works behind the counter (which would require a bookbuyer to request specially a work); (3) decline to carry the materials in question; or (4) bar juveniles from the store.[4] Plaintiffs maintained that because bookbuyers generally make their selections by browsing through displayed books, and because adults would be reluctant to enter an "adults only" store or section of a store, the statute effectively restricts the entire population's access to books that fall within its purview. In effect, argued plaintiffs, the law reduces the adult population to reading and viewing only works suitable for children, something this Court has repeatedly held is prohibited by the First Amendment. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 73–74 (1983); *Butler* v. *Michigan*, 352 U. S. 380, 383–384 (1957). Consequently, they asserted, the law must undergo First Amend-

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thing more than an abstract interest in the availability of reading materials in bookstores, an interest which is no different from the interests of all other local citizens who patronize bookstores." *American Booksellers Assn.* et al. v. *Strobel*, 617 F. Supp. 699, 704 (ED Va 1985). The remaining plaintiffs are the appellees here.

[4]There are a number of different types of booksellers in Virginia. Some are traditional bookstore owners. Others include, for example, grocery store owners, drug store owners, and airport convenience store owners who have one or more book or magazine racks. The ability of these diverse types of booksellers to utilize the differing methods of compliance varies.

ment scrutiny. Applying that scrutiny, plaintiffs reasoned that the law is unconstitutional because the State's interest in restricting the display of these works is insubstantial and the law does not further this interest by the least restrictive means available. In support of that proposition, plaintiffs argued that the statute criminalizes the mere *display* of covered works, even if there is no evidence that a juvenile would *actually* examine and peruse them.

Plaintiffs also maintained that the law is overbroad in that it restricts access by mature juveniles to works that are "harmful" only to younger children. Finally, the statute is purported to be unconstitutionally vague, in part because it is allegedly impossible to determine what standard should be used in deciding whether a work is appropriate for juveniles of different ages and levels of maturity.[5]

Plaintiffs brought suit under 42 U. S. C. § 1983 against the Arlington County Chief of Police. Pursuant to 28 U. S. C. § 2403(b), the Virginia Attorney General intervened. The defendants argued that the 1985 amendment is a necessary corollary to the prior sales restriction, as one without the other is useless. Defendants also challenged plaintiffs' reading of the statute's reach, arguing that it extends only to "borderline obscenity." Further, compliance with the statute may be achieved, they maintained, by placing distinctive tags on the restricted materials, or placing them behind "blinder racks." Therefore, they asserted the statute has no significant "spillover" effect on adults, and any effect there might be is permissible under a "time, place, or manner" test. Even under strict First Amendment scrutiny, they argued, the 1985 amendment is constitutional due to the State's com-

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[5] Plaintiffs argued that these problems do not arise in the context of the original statute, which regulates only the *sale* of certain materials. According to plaintiffs and the Court of Appeals, at the point of *sale* a bookseller can make an individualized determination as to the suitability of a specific item for a specific child. 802 F. 2d 683, 693–694, n. 7 (CA4 1986).

pelling interest in protecting juveniles and the lack of a less restrictive alternative to achieve effectively that interest.

Plaintiffs moved for a preliminary injunction, and defendants moved to dismiss or abstain. At the preliminary injunction hearing, which became a trial on the merits, plaintiffs called three witnesses: Two booksellers (the owners of the two plaintiff bookstores) and the general counsel of plaintiff American Booksellers Association. The two booksellers testified that their stores were typical in most respects of non-"adults only" general-subject bookstores in the State. The booksellers introduced as exhibits a total of 16 books that they believed were examples of books the amended statute covered, and testified that the law might apply to as much as one half of their inventory. The exhibits were extremely diverse, including classic literature, health texts, poetry, photography, and pot-boiler novels. Finally, all three witnesses testified as to the steps they believed a bookseller would have to take to conform to the statute, repeating the four options discussed above. On cross-examination, defendants elicited testimony from the bookstore owners that they were unfamiliar with the portion of the law defining "harmful to juveniles." Therefore, defendants submitted that the plaintiffs' witnesses were testifying under a mistaken impression as to the statute's coverage.

The trial court denied the State's motion to dismiss the case and declined to abstain. On the merits, it held as a factual matter that the statute would cover between 5 and 25 percent of a typical bookseller's inventory. Further, the court agreed with plaintiffs as to the alternatives available to comply with the law, rejecting defendants' suggestion that a bookseller could avoid criminal prosecution by merely tagging the materials or placing them behind "blinder" racks. The court reasoned from this that the 1985 amendment placed significant burdens on adult First Amendment rights by restricting adult access to nonobscene works. It con-

cluded that the 1985 amendment was overbroad, and permanently enjoined its enforcement.

The Court of Appeals for the Fourth Circuit affirmed. 802 F. 2d 691 (1986). While critical of the evidentiary basis for the determination, the court neither accepted nor rejected expressly the District Court's finding as to the scope of the statute. *Id.*, at 696. At the same time, however, the court stated that "[i]t cannot be gainsaid" that book retailers would face significant difficulty attempting to comply with the statute. The Court of Appeals, like the District Court, adopted plaintiffs' theory as to the acceptable modes of compliance with the statute and rejected the Attorney General's alternatives, reasoning that tagging the materials or placing them behind blinder racks would not, as a practical matter, deter juveniles from examining and perusing the works. The court questioned whether treating all juveniles identically was constitutional, but did not determine the issue.

The State appealed to this Court, alleging a conflict among the Courts of Appeals. See *Upper Midwest Booksellers Assn.* v. *Minneapolis*, 780 F. 2d 1389 (CA8 1985) (holding a similar ordinance constitutional), and *M. S. News Co.* v. *Casado*, 721 F. 2d 1281 (CA10 1983) (same). We noted probable jurisdiction. 479 U. S. —— (1987).

II

We first address plaintiffs' standing to bring suit. The State argued before the District Court that plaintiffs lacked standing to bring a pre-enforcement facial challenge, alleging that plaintiffs did not suffer sufficient harm, and what harm they did suffer was economic, not speech related. Further, the State argued that plaintiffs' challenge was premature, having been made before the statute became effective.

To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some "'threatened or actual injury resulting from the putatively illegal action . . . .'" *Warth* v.

Seldin, 422 U. S. 490, 499 (1975), quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973); see also *Association of Data Processing Service Organizations* v. *Camp*, 397 U. S. 150, 151–154 (1970). That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution. See *Craig* v. *Boren*, 429 U. S. 190, 194 (1976); *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973).

Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, "'[l]itigants [] are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Secretary of State of Maryland* v. *J. H. Munson Co.*, 467 U. S. 947, 956–957 (1984), quoting *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973). This exception applies here, as plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers.[6]

We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

III

We have concluded that we should not attempt to decide the constitutional issues presented without first having the

[6] The complaint also alleged a violation of plaintiffs' own First Amendment right to display the restricted works, but that claim was not passed on below and is not pressed here.

Virginia Supreme Court's interpretation of key provisions of the statute. Several factors combine in a unique way to counsel that course.

At oral argument the State's attorney[7] conceded that if the statute is read as plaintiffs contend, not only is it unconstitutional but its enforcement *should*, as a normative matter, be enjoined. Indeed, he seemingly conceded that if any of the books introduced as plaintiffs' exhibits below is covered by the statute, plaintiffs should prevail.[8] However, the State argues that the statute's coverage is much narrower than plaintiffs allege or the courts below found. It contends that the statute covers only a very few "borderline" obscene works, and none of the exhibits introduced by plaintiffs.[9]

There was testimony below that if the coverage of the statute is as narrow as the State argues, it would reach less than a single shelf of a typical bookseller's wares. App. 222. If that is true, methods of compliance exist that are substantially less burdensome than those discussed by the lower

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[7] The term "State's attorney" refers to Mr. Smith, the Assistant Attorney General who argued the case.

[8] After noting that plaintiffs have asserted that the statute covers the broad range of works represented by their exhibits below, the State's attorney said:

"If that range is correct, if they are correct that this amendment involves that material, then we lose the case, and I submit to the Court that we *should* lose the case, because the Commonwealth of Virginia does not desire to restrict in any way, directly or indirectly, that type of material.

. . . . . .

"I will wager this case on one exhibit, Plaintiff's Exhibit Number 4, The Penguin Book of Love Poetry. *If that book falls within this statute, then we concede the case.* You don't have to look at all of them. Just look at that one book. Or if you want to look at all of them, *the same thing goes for all of them* . . . ." Tr. of Oral Arg. 4, 19, (emphasis added).

[9] We note that in her brief to the Court of Appeals, the Attorney General conceded, or appeared to concede, that one of the exhibits, Hollywood Wives, would be covered. Opening Brief for Appellant Commonwealth of Virginia in Nos. 85–1961(L), 85–1999, pp. 27–28. At oral argument before this Court, that apparent concession was disclaimed. Tr. of Oral Arg. 5.

courts. For example, as is currently done in one of the plaintiff bookstores, a single shelf containing restricted books can be located within sight of the bookseller. If a juvenile examines or peruses the materials, an employee can prevent his continuing to do so. App. 207. This is not to say that the law might not still raise substantial constitutional questions. However, the nature of the First Amendment "spillover" burden to adults would be dramatically altered.

Plaintiffs, pointing to the lower courts' interpretation of the law, paint a strikingly different picture. They see the statute as a broad enactment, potentially applying to a huge number of works. This is not a law, they say, covering only "borderline obscenity," but rather a device expunging from display up to a quarter of the books available to juveniles and, as a practical matter, to adults. The courts below similarly regarded the coverage; for a law, like Virginia's, that applies to up to 25 percent of a typical bookstore's inventory (as the District Court held) or that would confront booksellers with a "substantial problem" of compliance (as the Court of Appeals stated) must extend beyond only the nearly obscene. This broader reading of the statute would raise correspondingly greater First Amendment questions.

This Court rarely reviews a construction of state law agreed upon by the two lower federal courts. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985). However, this case presents the rare situation in which we cannot rely on the construction and findings below. There is no reliable evidence in the record supporting the District Court's holding that the statute reaches up to 25 percent of a typical bookstore, since the two bookstore owners who testified were unfamiliar with the statutory definition of "harmful to minors." We cannot tell whether the court's finding was based on an independent determination by the District Judge, as plaintiffs suggest, or the flawed testimony. But even if the holding were based on the former, we cannot discern the evidentiary basis for it. Neither can we rely on the

Court of Appeals' construction. That court criticized the basis of the District Court's holding, but gave no alternative basis for its own determination. Given this history we are reluctant to adopt without question the lower courts' interpretation of state law. At the same time, as the Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authoritative.

Under these unusual circumstances, where it appears the State will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court. Certification, in contrast to the more cumbersome and (in this context) problematic abstention doctrine, is a method by which we may expeditiously obtain that construction. See *Bellotti* v. *Baird*, 428 U. S. 132 (1976) (remanding with instructions to certify questions pertaining to construction of a state statute that was susceptible to multiple interpretations, one of which would avoid or substantially modify a federal constitutional challenge). Consequently, we shall resort to its certification Rule 5:42 to ask the Virginia Supreme Court whether any of the books introduced by plaintiffs as exhibits below fall within the scope of the amended statute, and how such decisions should take into account juveniles' differing ages and levels of maturity.

We will also certify a second question. At oral argument, in response to a question from the Bench, the State's attorney declared that a bookseller will not be subject to criminal prosecution if, as a matter of store policy, the bookseller prevents a juvenile observed reviewing covered works from continuing to do so, even if the restricted materials are not segregated.[10] If this is what the statute means, the burden to

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[10] The following colloquy occurred at oral argument:

the bookseller, and the adult bookbuying public, is significantly less than that feared and asserted by plaintiffs. (Even if the statute means that the bookseller is required to announce or manifest the store's policy, perhaps by appropriate signs in the store or other reasonable measures, the burdens might be less than under plaintiffs' construction.)

It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975); *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973). The key to application of this principle is that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

It is not necessary in this case, however, to decide whether the statute is readily susceptible of the Attorney General's

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"QUESTION: Mr. Smith, suppose a bookseller does not segregate books. Would he be able to comply with the Virginia statute by simply saying, whenever I see a juvenile, a person who looks to me like a juvenile, browsing in a book which is a book that I ought to know falls within this statute, I stop that juvenile and ask him to leave the store. That is my store policy.

"*Would that be enough to comply with the statute?*

"MR. SMITH: *Yes sir.*

. . . . .

"QUESTION: . . . I am talking about the language 'display for a commercial purpose in a manner whereby juveniles may examine and peruse.' 'May.'

"MR. SMITH: Because I think—

"QUESTION: 'May' means it is possible for them to do so or they are permitted to do so.

"MR. SMITH: This Court had a case which I have cited in my brief called the Foreign Products Case, and that case said that when used in a statute as this 'May' is used it can mean might or it can mean reasonable certainty or it can mean actual tendency under Virginia law, since it has to be strictly construed against the Commonwealth, *it has to be what you have suggested, and it would qualify.*" Tr. of Oral Arg. 51–52 (emphasis added).

current interpretation. The situation we confront is unusual. Another question is already being certified, enforcement of the statute will remain enjoined throughout the certification process, and no state court has ever had the opportunity to interpret the pertinent statutory language. In these circumstances, there is some advantage and no cost, either in terms of the First Amendment chilling effect or unnecessary delay, to certifying a proffered narrowing construction that is neither inevitable nor impossible. Thus, we certify this second question.[11]

IV

Pursuant to Rule 5:42 of the Virginia Supreme Court, we respectfully certify to that court the following questions:

> 1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2–390 and 18.2–391 (1982 and Supp. 1987), properly construed, encompass any of the books introduced as plaintiffs' exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?
>
> 2. What meaning is to be given to the provision of Virginia Code § 18.2–391(a) (Supp. 1987) making it unlawful "to knowingly display for commerical purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute

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[11] The constitutional issues relating to the display of visual materials (Va. Code § 18.2–391(a)(1) (Supp. 1987)) are potentially different from those relating to the display of written works (§ 18.2–391(a)(2) (Supp. 1987)). However, we believe that answers to the certified questions will substantially aid us in resolving both inquiries.

be complied with if the store's policy were announced or otherwise manifested to the public?

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 86–1034

VIRGINIA, APPELLANT *v.* AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[January 25, 1988]

JUSTICE STEVENS, concurring in part and dissenting in part.

A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument in this Court. The Assistant Attorney General was certainly correct when he conceded that a statutory restriction on the commercial display of *The Penguin Book of Love Poetry* would be unconstitutional, but it is less clear that *none* of the 16 exhibits introduced by the plaintiffs could be subjected to the statutory prohibition. Moreover, the colloquy that is partially quoted in n. 8, *ante*, at p. 9, is neither entirely unambiguous nor equivalent to a formal commitment by the State to dismiss the appeal if the Virginia Supreme Court advises us that one or more of the exhibits is covered by the statute. I would therefore modify the first certified question to ask the state court which, if any, of the plaintiff's exhibits is covered by the statute. Because the arguable literary, artistic, or scientific value of the exhibits varies widely, as does the character of the sexual references in the different books, an answer to the question I would ask would be of great help in understanding the reach of the statute and evaluating its validity. Accordingly, while I am in substantial agreement with what the Court has written, I respectfully dissent from the Court's refusal to ask the question that I have proposed.

SHOW PROCEEDINGS AND ORDERS DATE: [11/16/88]

CASE NBR: [86101034] AFX STATUS: [ ]
SHORT TITLE: [Virginia]
VERSUS [Am. Booksellers Assn., Inc.] DATE DOCKETED: [122486]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Dec 24 1986		Statement as to jurisdiction filed.
Dec 31 1986		Appendix of appellant Virginia filed.
Jan 23 1987		Motion of appellees to dismiss or affirm filed.
Jan 23 1987		Brief amici curiae of Georgia, et al. filed.
Jan 23 1987		Brief amicus curiae of Minneapolis,MN filed.
Jan 28 1987		DISTRIBUTED. February 20, 1987
Feb 6 1987		Reply brief of appellant Virginia filed.
Feb 23 1987		PROBABLE JURISDICTION NOTED. In addition to the Question Presented on appeal, the parties are directed to brief and argue the question of appellees' standing.
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Mar 6 1987		Order extending time to file brief of appellant on the merits until April 20, 1987.
Apr 16 1987		Brief amicus curiae of Youth Advocacy filed.
Apr 20 1987		Joint appendix filed.

SHOW PROCEEDINGS AND ORDERS DATE: [11/16/88]

CASE NBR: [86101034] AFX STATUS: [ ]
SHORT TITLE: [Virginia]
VERSUS [Am. Booksellers Assn., Inc.] DATE DOCKETED: [122486]
PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
Apr 20 1987		Brief of appellant Virginia filed.
Apr 20 1987		Brief amicus curiae of National Legal Foundation filed.
Apr 20 1987		Brief amicus curiae of Minneapolis, MN filed.
May 30 1987		Record filed.
Jul 2 1987		Brief of appellees American Booksellers Assn., et al. filed.
Jul 2 1987		Brief amici curiae of Jean M. Auel, et al. filed.
Jul 2 1987		Brief amicus curiae of Freedom to Read Foundation filed.
Jul 2 1987		Brief amici curiae of ACLU, et al. filed.
Jul 10 1987		* Joint Appendix (Volume II) (Complete Trial Testimony)filed.
Jul 27 1987		CIRCULATED.
Aug 31 1987		SET FOR ARGUMENT. Wednesday, November 4, 1987. (1st case).
Sep 14 1987		Reply brief of appellant Virginia filed.
Oct 7 1987		Record filed.

2 pp

CASE NBR: [86101034] AFX STATUS: [ ]
SHORT TITLE: [Virginia]
VERSUS [Am. Booksellers Assn., Inc.] DATE DOCKETED: [122486]

DATE	NOTE	PROCEEDINGS & ORDERS
Nov 4 1987		ARGUED.
Nov 10 1987		Motion of appellees for leave to file a supplemental brief after argument filed.
Nov 16 1987		Motion of appellees for leave to file a supplemental brief after argument GRANTED.
Nov 19 1987		Motion of appellant for leave to file a supplemental brief after argument filed.
Nov 30 1987		Motion of appellant for leave to file a supplemental brief after argument GRANTED.
Jan 25 1988		QUESTIONS CERTIFIED TO THE SUPREME COURT OF VIRGINIA. Brennan, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Marshall, Blackmun, O'Connor and Scalia, JJ., joined. Stevens, J., filed an opinion concurring in part and dissenting in part.
Sep 23 1988		Certified Question answered by Supreme Court of

Last page of docket

SHOW PROCEEDINGS AND ORDERS DATE: [11/16/88]

CASE NBR: [86101034] AFX STATUS: [ ]
SHORT TITLE: [Virginia]
VERSUS [Am. Booksellers Assn., Inc.] DATE DOCKETED: [122486]

DATE	NOTE	PROCEEDINGS & ORDERS
Sep 23 1988		Certified Question answered by Supreme Court of Virginia.
Sep 26 1988		DISTRIBUTED. OCTOBER 14, 1988. (Certified Question and Answer).
Sep 28 1988		REDISTRIBUTED. October 14, 1988
Oct 17 1988		Adjudged to be VACATED and REMANDED for further consideration in light of Commonwealth of Virginia v. American Booksellers Association, Inc., et al.------ Va. ------ (Sept. 23, 1988).
Oct 22 1988	Application (A88-324)	for order to issue judgment forthwith at request of Attorney General of Virginia, submitted to The Chief Justice.
Oct 24 1988		One box of books received.
Oct 26 1988		Application (A88-324) granted by the Chief Justice.
Oct 26 1988		Judgment issued.